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IN THE

Supreme Court of the ~~United~~ States

TERM—1942

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FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED AND SWIFT & COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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Franham Distributors, Inc.

April 6, 1942.

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IN THE

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TERM—1942

FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Franham Distributors, Inc., respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court, entered on February 6, 1942, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on October 31, 1940, in favor of the defendants New York World's Fair and Swift & Company. Application for a rehearing, timely filed, was denied by the Circuit Court on January 8, 1942.

THE ACTION BELOW

The action below was commenced in the Supreme Court, New York County and removed to the United States District Court for the Southern District of New York upon a complaint which contained a count against the defendant World's Fair for damages for breach of a contract which awarded the hamburger and frankfurter concession at the World's Fair to the plaintiff and against the defendant Swift and Company upon a separate count for inducing a breach of the same contract.

The answer interposed to the complaint by the World's Fair was substantially that no contract had been entered into between the plaintiff and the defendant World's Fair because a bid for the hamburger and frankfurter concession was required to be accepted in writing, signed by the president of the Fair corporation and that the bid of the plaintiff was rejected by the Executive Committee of the Fair on the ground that it appeared that the people connected with the plaintiff were not sufficiently qualified as restaurateurs to operate the concession.

The defendant Swift & Company relied on the contention, as appears by its answer, that there was no contract between the plaintiff and the defendant World's Fair and denied that it in any way interfered with the contract between the plaintiff and the World's Fair if any there was.

The trial of the action below proceeded before Judge Grover M. Moscowitz and a jury in the Southern District Court of New York on October 7th, 1940, and concluded with a dismissal of the complaint on the 10th day of October, 1940. The complaint was dismissed on the ground that the plaintiff had failed to establish a cause of action.

We shall refer hereinafter to the defendant, New York World's Fair 1939 Incorporated, as World's Fair. The references are to the folios in the record below. The Circuit Court of Appeals, as stated, affirmed the judgment of dismissal, with an opinion, hereinafter referred to.

STATEMENT OF FACTS INVOLVED

Preparations for the World's Fair were begun in 1937, and in July of that year, the Fair entered into a contract with Swift & Company for the building, construction and maintenance by Swift & Company of an exhibit at the Fair (179).

Towards December of 1937, the Fair solicited bids for the hamburger and frankfurter concessions (180).

About that time one Tom Trulis, who had been in the restaurant business for years and had operated hamburger and frankfurter concessions at the Navy Pier in Chicago, and other places, approached Max N. Natanson, a real estate operator, with the idea of forming a syndicate for the purpose of obtaining the hamburger and frankfurter concession for which the Fair was soliciting bids. In turn, Natanson approached Louis and Morris Golde, men of the highest business reputation and of very substantial means, as subsequently admitted by the Fair. The Goldes formed the plaintiff corporation for the purpose of securing the concession and operating it (181-186).

The Goldes proceeded to get the information that the Fair disseminated to all proposed bidders, and filed, in accordance with the procedure outlined by the Fair, a questionnaire, stating the experience of the principal officers and stockholders of the corporation in the operation of a

frankfurter and hamburger concession and also their financial ability to carry out the enterprise (186-188).

Tom Trulis, the then president of the plaintiff, later temporarily resigned because it was necessary for him to travel frequently in connection with his other enterprises (188). The questionnaire was sent to the Fair and was considered by Commander Howard A. Flanigan, the then Assistant to the President and Chairman of the Pre-Qualifications Committee, who afterwards became its Executive Vice-President in charge of all the affairs at the Fair, including its concessions and exhibits (189) and was also considered by Maurice Mermey, Director of Exhibits and Concessions, also a member of the Pre-Qualifications Committee (190).

Thereafter, on February 1, 1938, plaintiff filed a bid in writing together with a check for $5,000 as required by the regulations of the Fair. This was the highest and, as claimed by the appellant, the successful bid.

The next highest bidder was the White Tower Management Co.; the third highest bidder was Edward Levine, proprietor of the Brass Rail Restaurant in New York City; and the fourth highest bidder was the York Food Co., subsidiary of Swift & Company.

These bids, sealed, were filed February 1, 1938. The bids were opened at the office of the Fair, at the Empire State Building, at 12 o'clock on that day and read in the presence of James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the Fair, and Commander Flanigan, its Executive Vice-President, together with Louis Golde and Max N. Natanson (198).

On the same afternoon, Hemingway telephoned Mr. Golde at his office, 522 Fifth Avenue, New York City, and not finding him in telephoned Mr. Natanson. Mr. Heming-

way told Natanson that the Franham Distributors, Inc. was the successful bidder and that the concession had been awarded to it and that the Goldes should go to the Legal Department of the Fair, the next day at three o'clock and bring their lawyer with them to go over the contract which the Fair was preparing for signature in the meantime. Natanson was told by Hemingway that they should be ready to close at three o'clock on February 2, 1938 (198, 200). In the meantime, Golde received notice of Hemingway's call, at his office, and immediately telephoned him. Hemingway gave Golde substantially the same information as he had conveyed to Natanson a few moments before, namely "be ready to close; the concession had been awarded to Franham, they were the highest bidder; they were the successful bidder, to please be there with their lawyer the next day at three o'clock in the Legal Department of the Fair, at the Empire State Building to sign the contract" (201).

The next day Louis Golde, the then president of the plaintiff, together with Natanson, and Julius Zieser, attorney for the Corporation, proceeded to the Legal Department of the Fair to sign the contract. Present were James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the Fair, and Maurice Mermey, Director of its Exhibits and Concessions. They both congratulated Mr. Golde on having been the successful bidder and on having been awarded the concession and they told him that the contract had been prepared for signature (202, 203). This contract which had been prepared by Mr. Hemingway between 12 o'clock on February 1st, the previous day, and 3 o'clock that afternoon, was complete in every detail, setting forth all the terms, conditions and provisions for

the award of the concession to the plaintiff in accordance with the terms of its bid (Pltf. Ex. 5; 565, 639, 645). The contract was handed to Mr. Zieser, who questioned Hemingway as to whether the contract was in the same form as the sample contracts distributed by the Fair with the original documents. Hemingway told Zieser that it was the same. Zieser looked it over and announced to Mr. Golde that the contract was satisfactory and ready for signature (204-205).

At that point, Commander Flanigan entered the room and was introduced to Golde, Natanson and Zieser. Flanigan congratulated Golde upon his having been the successful bidder and wished him luck with the concession. Hemingway then told Flanigan that the contract was ready for signature. Flanigan then asked Golde whether he had made any commitments for the meat to be sold. Golde replied in the negative (206-207). Flanigan then said that Swift & Company had been very much disappointed in not having received the concession and it would be a great favor to the Fair as well as Swift & Company, which was one of the largest exhibitors at the Fair, if the Franham Distributors, Inc. would agree to purchase all its meats from Swift & Company so that their name would appear on the stands. Golde agreed to meet with a Swift & Company representative to discuss the matter and Flanigan, in the presence of Golde, told Mermey to ring up E. L. Morris, President of the York Food Co., subsidiary of Swift & Company, which had been an unsuccessful bidder for the concession (209-210) for the purpose of arranging an appointment between Morris and Golde that very afternoon at 4 o'clock. While Mermey was telephoning, Golde turned to Flanigan and asked him whether it would be

possible for the Fair in turn to do him a favor and reduce the amount of the bonds to be subscribed for as part of the agreement. Flanigan said that such a proposal would not be acceptable, and Golde thereupon acquiesced in this decision (211). Flanigan then said that if an arrangement with Swift & Company would be consummated, there might be a possibility of scaling down the percentages of gross income to be turned over to the Fair. Golde, however, indicated his satisfaction with the percentages agreed upon (212). Mermey then returned and told Flanigan an appointment had been made for E. L. Morris and Golde at 11 o'clock the next morning. Just before they left, Zieser turned to Flanigan and asked him when they should return to sign the contract and Flanigan said that the contract could be signed the next afternoon; that Golde and Morris should talk about arranging to buy the meats from Swift & Company and then Golde should ring Flanigan and fix the hour for signing the contract (215).

Immediately after the parties separated, Flanigan sent for Morris (President of the York Food Co., Swift & Co. subsidiary, the fourth highest bidder), they had a talk. Flanigan then saw Grover Whalen, President of the Fair (214), and an Executive Committee meeting was then called late that afternoon at the office of the Fair and a resolution passed rejecting all of the bids (216). Present at this meeting was Harvey Gibson, an intimate personal friend of Mr. Traynor, Treasurer of Swift & Company, one of the largest depositors of the Manufacturers Trust Company, whose president and chairman of the Board of Directors was none other than the same Harvey Gibson (217). No notice of the rejection of all of the bids was given to the plaintiff until later. The Executive Committee

thereafter proceeded to change the specification for bidding and to lower the price to be paid for the concession to the very exact minimum that York Food Company (Swift's subsidiary) had bid (216-217).

The next morning Morris met with Golde, who then had no knowledge of the attempted rejection of all of the bids, and he told Golde that he was not interested in making any arrangements for selling meat to the plaintiff but that Swift & Company wanted the concession for itself. Morris used the following language to Golde (220): "Now wait a minute, you haven't got that concession yet. I have been after that concession for eighteen months. We have got an exhibit at the Fair. If we don't get that concession, I have told the Fair people that we won't go on with our exhibit". Morris admitted having revealed his intentions to Flanigan and offered Golde some money to step out (221). Golde refused and they parted, Morris suggesting that he would telephone Chicago and submit the meat proposition to the home office of Swift & Company (222). Morris subsequently told Golde that he telephoned Chicago and that Chicago had also refused to consider the meat proposition. In fact, it appeared from the examination before trial of Morris that he never did telephone Chicago because he had received explicit instructions to obtain the concession and to have nothing to do with any other proposition (223).

A private wire was sent from Morris to Spang, Executive Vice-President of Swift & Company in Chicago to the following effect:

> "Get after Harvey Gibson to further develop the idea that when the concession is awarded again, there shall be very few bidders, and in addition to

let him understand that unless we get this concession, we shall modify our plans for the exhibit or possibly eliminate the exhibit entirely" (224).

Another wire, this time from Harvey Gibson to Traynor, Treasurer of Swift & Company in Chicago, intimated to Traynor that he, Harvey Gibson and Grover Whalen, now formed the committee, entrusted with the task of letting concessions, Commander Flanigan having been superseded. This telegram suggested to Traynor, Treasurer of Swift & Company, that the Swift & Company bid be put in through Gibson, one of the two members of the committee (225).

Swift & Company through its subsidiary, York Food Company, of course got the concession at the exact amount of its original unsuccessful bid (195-197). This bid, it is to be noted, was considerably lower than the Franham Distributors, Inc.'s bid (227).

Plaintiff immediately commenced to write letters to the Fair, demanding an explanation and this was followed by the institution of the present suit (228). Then while the contract between the Fair and Swift & Company through its subsidiary, York Food Company, was being drawn, a letter was sent by E. L. Morris to Hemingway to the following effect: "Delay consideration of the contract until we learn the basis of the Franham suit" (229).

The complaint was then served, charging the Fair with a breach of contract to let the hamburger and frankfurter concession to the plaintiff and also joining Swift & Company as a co-defendant in tort for inducing a breach of the contract between the plaintiff and the defendant World's Fair.

Immediately thereafter, a private telegram was sent from Spang, Executive Vice-President of Swift & Company in Chicago, to Morris, President of the York Food

Co., instructing him to refrain from giving out any publicity about the contract that they had made (231).

Thereafter, it was arranged that Childs & Co. should take the contract off their hands with the approval of Harvey Gibson and Grover Whalen, the Fair's Executive Committee. From the Childs & Co. files, the contract was procured, indicating that Swift & Company agreed to provide the meats and Childs was to operate and maintain the concession and take from Swift & Company over $200,000 of the bonds which Swift had subscribed for to the extent of $550,000.

The defense of the defendant World's Fair, as appears from the answer interposed to the complaint (fols. 29, 72) and the statement of its counsel in opening to the jury (240, 271), was that no contract had ever been entered into between the plaintiff and the defendant World's Fair because the bid was required to be accepted in writing, signed by the President of the Fair corporation (247) and that the bid of plaintiff was rejected by the Executive Committee on the ground that it appeared that the Franham people were not sufficiently qualified as restaurateurs to operate the concession (268).

Defendant Swift & Company relied on the contention that there was no contract between the plaintiff and the defendant World's Fair and denied that it, in any way, interfered with the contract between the plaintiff and the World's Fair, if there were any.

A previous trial had terminated in a mistrial because of a ruling of the trial judge requiring certain proof of damages not available at that time.

A motion for summary judgment was made by the defendant World's Fair in which it was contended,

1. That "the alleged oral agreement of said defendant to execute the 'concession agreement' was void by reason of the statutes of frauds of the State of New York, concerning real and personal property" (75).

2. "That irrespective of the statutes of frauds and oral acceptance of plaintiff's bid by the terms thereof would not bind said defendant to execute the concession agreement and that all bids for the concession involved herein were rejected by the Fair" (76).

Judge Bondy decided this motion in favor of the plaintiff. By order dated August 3, 1939 (115, 118), his opinion settled the question whether plaintiff's alleged oral agreement was violative of the various provisions of the statute of frauds in the negative. The Court construed the contract as an agreement to lease rather than a license to enter upon land which lease was for a term not exceeding one year and, therefore, need not have been in writing (686, 687). The Court also held that the contract could have been performed by both parties within one year from its making, and, therefore, did not violate Section 31, Subdivision 1 of the New York Personal Property Law.

As to the contention "that the alleged oral acceptance of the bid cannot bind the defendant", the Court said that if such oral acceptance was "deemed a defective acceptance it may be considered as a counter offer to which the plaintiff manifested its assent" (689). The Court then added

> "Moreover, a jury crediting the plaintiff's version of the discussion between the parties on February 2nd, 1938 might find that at that time, the parties agreed upon all the terms of the agreement and accordingly entered into a binding contract notwith-

standing their failure to execute a formal written instrument" (Citing cases) (689, 690).

At the trial, Louis Golde, President of the plaintiff, took the stand. Golde was questioned concerning a telephone conversation between himself and James S. Hemingway, member of the firm of Lord, Day & Lord, attorneys for the fair, which is claimed to have occurred during the afternoon of February 1st within a few hours after the bids had been opened at the offices of the Fair in the Empire State Building (333). The attorney for Swift & Company objected to any recital between Golde and Hemingway "on the ground that no representative of Swift & Company was present at the conversation and that, therefore, it cannot be binding" (335). This objection was sustained and the attorney for the defendant World's Fair interposed his objection "to any conversation with Mr. Hemingway on the ground that it has not been shown that Mr. Hemingway was an officer, agent or employee of the defendant corporation" (336). The court sustained the latter objection on the ground that the authority would "have to be shown first". The attorney for the Fair then conceded that Hemingway was a member of the law firm of Lord, Day & Lord, with offices in the Legal Department at the Fair and the attorneys for the Fair doing the legal work of the Fair, and that among his duties in the Concessions Department was to render sundry legal services for the Fair and to draft all the contracts in the Concessions Department (337, 338). The attorney for the defendant World's Fair again pressed his objection and it was sustained (339, 340).

Before attempting to interrogate Golde concerning conversations had with Maurice Mermey, the Director of Exhibits and Concessions at the Fair, which conversations

were alleged to have taken place at the Legal Department of the Fair on February 2nd, at 3 o'clock, the attorney for the defendant World's Fair was asked to concede and did concede "that Mr. Mermey was Director of Concessions at that time; that he was engaged as Director of Concessions in getting people interested in getting concessions" (344), and also that he was a member of the Pre-Qualifications Board (346). The court excluded such testimony in the following words:

"I won't permit any conversation with him" (346).

Plaintiff's counsel then read from the minutes of the last trial, beginning at page 60 thereof, where counsel for the defendant World's Fair conceded that Mr. Hemingway was a member of the firm of Lord, Day & Lord, counsel for the defendant World's Fair (350); that Hemingway had an office at the World's Fair on the 1st and 2nd days of February, 1938, where he acted in pursuance of certain duties as a member of the firm of Lord, Day & Lord, attorneys for the World's Fair corporation (351); and that Hemingway was spending a very large percentage of his time doing legal work for the World's Fair at the time in question (352).

With respect to Mr. Mermey the concession made at the previous trial was read that he was a member of the Pre-Qualifications Board, one of those who passed upon the pre-qualifications of the plaintiff, in accordance with his duties as a member of the board (353); that he was Acting Director of Exhibits and Concessions (354) from December 31, 1937 to September 9, 1939 (355); that it was among his duties to plan and develop the plan for the various type of concessions to be had and to sell all of the

domestic exhibit space which was for sale (356) and to negotiate various contracts for concessions and exhibits (357-360).

With respect to Commander Flanigan the concession at the previous trial was read to the effect that from the period December 1, 1937, and on through the year 1938, Commander Flanigan was Administrator and Assistant to the President and became Executive Vice-President of the World's Fair, but his duties remained the same (365). That his duties with respect to the hamburger and frankfurter concession were that he had both general supervisory charge of it, and also as the Chairman of the Concessions Pre-Qualifications Board he had a more intimate and executive direction of it (368).

Mr. Golde, president of the plaintiff, was then asked what was said at the conversation between himself, Mr. Mermey, Commander Flanigan and Mr. Hemingway. The attorneys for the defendant World's Fair pressed the objection and the same was sustained (369) on the ground that no proof had been shown that any of these men had the right to enter into a contract (370).

Plaintiff's counsel then asked the judge to take these conversations subject to later connection so that a record may be made upon which the court could determine whether the plaintiff had failed to make out its case because of insufficient proof of authority on the part of any of these men to act on behalf of the corporation (384), but the court adhered to its ruling, saying:

"I think it will have to be connected first" (386).

Counsel then further argued (402) that the Court of Appeals and the United States Supreme Court had held that

it was for the jury to determine whether these men had apparent or implied authority. The court responded:

> "I do not think there is enough to go to the jury on that, I mean as the record presently stands" (402).

The court then continued to adhere to its ruling, excluding all further testimony concerning these alleged conversations.

Plaintiff's counsel then offered to read that part of the affidavit of the defendant World's Fair by Howard A. Flanigan, its Executive Vice-President, verified the 18th day of January, 1939, filed in this action by the defendant World's Fair in support of its motion for Summary Judgment, as an admission against the defendant as to the authority of Flanigan to act on behalf of the defendant World's Fair, in which, among other things, it was stated that Flanigan was the administrative assistant to the President of the Fair and in that capacity was responsible for the taking and *consideration* of bids for the concessions involved in this action (80). Objection was taken and the court sustained the objection (404-409).

Counsel for the plaintiff then offered to prove, in addition to what had gone before, that Mr. Mermey had authority to sell all of the domestic exhibit space to be sold and to negotiate the various contracts for the concessions and exhibits (413). The court then noted that it considered this matter already proven (413).

Mr. Golde was then asked by his counsel whether plaintiff's exhibit 10 for identification, the written contract for the hamburger and frankfurter concession, prepared by Mr. Hemingway, but unsigned, was in the hands of Mr. Hemingway and on the table before him on February 2nd, in the presence of Mr. Hemingway, Mr. Mermey and Commander

Flanigan at the World's Fair. Objection was made and sustained (420).

Plaintiff's counsel then sought to read into the record part of the deposition of Grover A. Whalen, then president of the defendant World's Fair, as follows:

> "Q. When did you first learn of the fact that Mr. Hemingway had prepared plaintiff's exhibit 5 for identification (pl. ex. 5 at the examination before trial is the same as pl. ex. 10 at the trial, the unsigned concession contract prepared by Hemingway for signature). A. I don't know as I have any definite knowledge that this specific concession agreement was drawn except that it was in the line of Mr. Hemingway's responsibility to draw these immediately after bids were received *and accepted by the corporation.*"

This testimony was stricken from the record upon motion by counsel for the defendant World's Fair (426).

James S. Hemingway then took the stand and was asked whether he prepared the contract for the parties about the 2nd day of February, 1938 (430). This question was objected to and excluded (431). He was then asked whether he met with Natanson, Louis Golde and their attorney, Julius Zieser, on February 2, 1938, at the legal department of the World's Fair—yes or no. Objection was made and sustained (431). He was further asked whether the agreement was present on the table before him at the time in question (432). The question was objected to and excluded (433).

The next morning plaintiff being unable to give testimony concerning any of the conversations had with these three persons whom it is claimed accepted the plaintiff's bid on behalf of the World's Fair, was forced to rest. Counsel

for the two defendants then moved to dismiss the complaint on the ground that on the law and the facts plaintiff failed to make out a *prima facie* case which motions were granted (456-8).

In dismissing the complaint the court accepted as the law of the case Judge Bondy's decision that an oral contract would have been sufficient (458), and then, continued:

> "surely it is contemplated that a written binding agreement must be signed before either side shall be bound. No such agreement was signed. However, the plaintiff contends that it made an oral contract, but it has not established by any satisfactory proof any such contract. It has not been shown that the persons with whom the representatives of the plaintiff spoke had any authority to bind the World's Fair Corporation.
>
> *Really, from the opening of the plaintiff's counsel itself, it appears that plaintiff knew they had no contract because they knew that it had to be in writing.* Of course I appreciate the fact that an oral contract may be binding even though the authorities may say that 'we intend to put it in writing', and even without putting it in writing the contract may nevertheless be binding. However, in this case there is no evidence that the parties with whom the plaintiff's representatives had conversations could bind World's Fair Corporation. The motion to dismiss is granted."

JURISDICTION

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 6, 1942. The jurisdiction of this Court is involved under Section 347 (a) of the Judicial Code, as amended, Title 28 (June 7, 1934).

QUESTIONS PRESENTED

I

Did the Court below err in holding that the trial judge properly excluded evidence of conversations between the president of the plaintiff corporation and the executive vice-president, Director of Exhibits and Concessions and attorney for the defendant World's Fair?

II

Did the Court below err in holding that the trial judge properly excluded a portion of the deposition of Grover A. Whalen, president of the defendant World's Fair, describing the nature of the authority of the attorney for the World's Fair?

III

Did the Court below err in holding that the trial judge properly excluded an affidavit of the vice-president of the defendant World's Fair, in which was set forth the nature and scope of his duties as such executive vice-president?

IV

Did the Court below err in failing to modify its order directing the dismissal of its cause of action herein against the defendant-appellee Swift & Company for inducing breach of an existing contract without prejudice and not upon the merits, so as to permit the bringing of an action against Swift & Company for malicious prevention of plaintiff's execution of a contract with the defendant-appellee New York World's Fair?

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court below holding that the trial judge, in excluding testimony of conversations between representatives of plaintiff corporation and a Director of Exhibits and Concessions, the executive vice-president and the member of the firm of attorneys for the defendant World's Fair, improperly decided as a matter of law a question which should have been reserved for the consideration of the jury as a question of fact. This is contrary to the decisions of the Courts of this State.

Hooker v. *Eagle Bank,* 30 N. Y. 83, 85-86;
Lyon v. *West Side Transfer Co.,* 132 App. Div. 777, 779;
Young v. *U. S. Mortgage & Trust Co.,* 214 N. Y. 279, 285;
Tyler v. *Anglo-American Sav. Assoc.,* 30 App. Div. 404, 406-8, 409;
Norton v. *Genessee Nat. Sav. Assoc.,* 57 App. Div. 520, 522-3;
Bathbun v. *Snow,* 123 N. Y. 343, 349;
Farmers Fund, Inc. v. *Tooker,* 207 App. Div. 37;
Leonardi v. *Times Square Automobile Co.,* 127 App. Div. 192, 193;
American Surety Co. v. *Philippine Nat. Bank,* 245 N. Y. 116, 126.

A. In excluding testimony of conversations between representatives of plaintiff corporation and representatives of defendant World's Fair concerning the making of the alleged oral concession agreement.

This exclusion is contrary to both Federal and New York Law.

Stecher Lithographic Co. v. *Inman,* 175 N. Y. 124, 127;
Sollows v. *McCann Erickson Inc.,* 27 Fed. Sup. 491.

B. In erroneously deciding the question of agency which should properly have been reserved for the consideration of the jury as a question of fact.

This is in complete contradiction of the decisions in New York State.

Bussing v. *Lowell Film,* 233 App. Div. 493;
Mott v. *Consumers' Ice Co.,* 73 N. Y. 543, 550;
Lyon v. *The West Side Transfer Co.,* 132 App. Div. 777, 779;
Gaillard Realty Co., Inc. v. *Manhattan Bross Co., et al.,* 238 App. Div. 84, 86;
Courtney v. *Baker,* 60 N. Y. 1, 5;
Conant v. *American Rubber Tire Co.,* 48 App. Div. 327, 330.

C. In failing to allow the admission of proof of the alleged oral agreement first and consideration of the question of authority at later stage of the trial.

This is contrary to the decisions of the Supreme Court of the United States.

First Unitarian Soc. of Chic. v. *Faulkner,* 91 U. S. 415;
Bank of the Metropolis v. *Guttschlick,* 14 Pet. 19, 39 U. S. 335, 340.

D. In failing to heed Judge Bondy's decision denying defendant World's Fair's motion for a summary judgment, which was the law of the case.

This is contrary to established practice sanctioned by the Supreme Court of the United States.

Davis v. *Davis*, 96 Fed. (2d) 512, 515 aff'd 305 U. S. 32;
Messenger v. *Anderson*, 225 U. S. 436, 444;
King v. *West Virginia*, 216 U. S. 92, 100.

E. In allowing the defendant by mere denial to evade the burden of showing lack of authority which was on the defendant World's Fair.

This is contrary to the decisions of the highest New York Courts.

Lyon v. *Westside Transfer Co.*, 132 App. Div. 777;
Patterson v. *Robinson*, 116 N. Y. 193.

2. The decision of the court below, holding that the trial judge in dismissing the complaint as against the defendant Swift & Co. on the merits was proper.

This is contrary to well-established law.

Lewis v. *Bloede*, 202 Fed. 7;
Union Car Advtg. Co. v. *Collier*, 263 N. Y. 386, 401.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and

send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

Dated, New York, N. Y., April 4th, 1942.

Signed: ALEXANDER PFEIFFER
Attorney for Franham Distributors, Inc.

IN THE

Supreme Court of the United States

TERM—1942

FRANHAM DISTRIBUTORS, INC.,
Petitioner,
against
NEW YORK WORLD'S FAIR 1939 INCORPORATED AND SWIFT & COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 124 Fed. (2) 82.

No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION AND STATEMENT OF THE CASE

The jurisdictional basis for the petition and statement of the case are stated in the petition and for the sake of brevity are not repeated herein.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

It is intended to urge the following errors:

1. It was error to hold that the trial judge properly excluded evidence of conversations between the president of the plaintiff corporation and the executive vice-president, Director of Exhibits and Concessions and attorney for the defendant World's Fair.

2. It was error to hold that the trial judge properly excluded a portion of the deposition of Grover A. Whalen, president of the defendant World's Fair, describing the nature of the authority of the attorney for the World's Fair.

3. It was error to hold that the trial judge properly excluded an affidavit of the vice-president of the defendant World's Fair, in which was set forth the nature and scope of his duties as such executive vice-president.

4. It was error to fail to modify the order directing the dismissal of the cause of action herein against the defendant Swift & Company for inducing breach of an existing contract without prejudice and not upon the merits, so as to permit the bringing of an action against Swift & Company for malicious prevention of plaintiff's execution of a contract with the defendant-appellee New York World's Fair.

ARGUMENT

I.

THE TRIAL JUDGE, IN EXCLUDING TESTIMONY OF CONVERSATIONS BETWEEN REPRESENTATIVES OF PLAINTIFF CORPORATION AND THE DIRECTOR OF EXHIBITS AND CONCESSIONS, THE EXECUTIVE VICE-PRESIDENT AND THE MEMBERS OF THE FIRM OF ATTORNEYS FOR THE DEFENDANT WORLD'S FAIR, THEREBY ERRONEOUSLY DECIDED AS A MATTER OF LAW, A QUESTION WHICH SHOULD PROPERLY HAVE BEEN RESERVED FOR THE CONSIDERATION OF THE JURY AS A QUESTION OF FACT.

It is a well-settled rule of law that a corporation must act through its officers or agents. Agents who are not expressly authorized to bind their corporation contractually, may yet bind it if they have been held out as apparently authorized to bind the corporation in a contract, and parties with knowledge of that fact, have dealt with them in reliance thereon.

No resolution of a Board of Directors of a corporation is necessary to bind it for the acts of its agents (*Hooker* v. *Eagle Bank,* 30 N. Y. 83, 85-86).

The validity of an agreement to lease a concession is not dependent upon the passage of a formal resolution authorizing such agreement (*Lyon* v. *West Side Transfer Co.,* 132 App. Div. 777, 779; *Young* v. *U. S. Mortgage & Trust Co.,* 214 N. Y. 279, 285).

If a contrary rule were to be adopted, then "corporations would be mere traps for the purpose of deceiving the

unwary and be the means of using the charter conferred by the state as an instrument of fraud" (*Tyler* v. *Anglo-American Sav. Assoc.*, 30 App. Div. 404, 406-8, 409; *Norton* v. *Genessee Nat. Sav. Assoc.*, 57 App. Div. 520, 522-3; *Bathbun* v. *Snow*, 123 N. Y. 343, 349; *Leonardi* v. *Times Sq. Auto Co.*, 127 App. Div. 192 at page 193.

A. Testimony of Conversations Between Representatives of Plaintiff Corporation and Representatives of Defendant World's Fair, Concerning the Making of the Alleged Oral Concession Agreement, Were Admissible as Part of the *Res Gestae*.

It is also a well-settled rule of law that conversations between one contracting party and an alleged agent of the other contracting party, are admissible provisionally as part of the *res gestae*, subject to connection by subsequent proof of express or implied authority of the agent to bind his principal (*Stecher Lithographic Co.* v. *Inman*, 175 N. Y. 124, 127; *Sollows* v. *McCann Erickson Inc.*, 27 Fed. Sup. 491 (Dist. Ct. N. Y. 1939)).

Upon these propositions of law Dean Wigmore, in the latest edition of his Treatise on Evidence, says (4 Wigmore, Sec. 1078):

> "It may be noted that the fact of agency must of course be somehow evidenced before the alleged agent's declarations can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is an agent would for that purpose be inadmissible as merely begging the question. *Nevertheless they might be received provisionally as verbal acts indicating that he was acting on another's behalf, not his own, leaving it to subsequent proof to establish his connection as agent*

with the present party. And of course the agent's statements, though not receivable as such, might become admissions as self-contradictions of his testimony upon the stand. And of course nothing prevents the alleged agent from testifying upon the stand to the fact of his agency; for here his testimony is not offered as an admission."

Applying this rule to the facts of the instant case it is clear that the trial judge erred in excluding conversations between the president of the plaintiff corporation, Louis Golde and Maurice Mermey, member of the Pre-Qualifications Board, and the Director of Exhibits and Concessions of the defendant World's Fair (356). It was also error to exclude conversations between the Goldes and Commander Flanigan, Executive Vice-President of the Fair and also a member of the Pre-Qualifications Board, and James S. Hemingway, member of the firm of Lord, Day & Lord, with offices at the legal department of the World's Fair, their client. These conversations, as appears from the opening of plaintiff's counsel, were material to establish plaintiff's cause of action. They of course, fit the category of "Verbal Acts" referred to by Dean Wigmore in his Treatise on Evidence. Plaintiff sought to establish through these conversations and the acts of the officers of the defendant World's Fair that its bid was accepted and a contract embodying the bid formally and completely prepared, which was done by Grover A. Whalen, President of the defendant World's Fair, stated in his examination before trial, "only in the event that bids had been received and *accepted* by the corporation" (426). In accordance with Judge Bondy's decision on the motion for Summary Judgment, which was the law of the case, such an acceptance could so be made

and could become a binding contract notwithstanding the failure and refusal thereafter of the defendant World's Fair to execute the formal written instrument (690).

In excluding testimony of those conversations, the trial judge usurped the function of the jury and decided that there was no proof that Mermey, Flanigan or Hemingway were authorized, expressly or apparently, to act for the defendant World's Fair. In affirming the ruling of the trial judge (see opinion, p. 84), it is urged that the Circuit Court committed error.

Dean Wigmore, in Volume 6 of his Treatise, states that the question of the admissibility of declarations of an agent as binding upon his principal is a question of substantive law and not a rule of evidence (6 Wigmore, Sec. 1769). In so stating, he cites Prof. James Bradley Thayer (Amer. Law Rev. XV, 80), as follows:

> "The term *'res gesta'* is freely used in another class of cases where the specific question is whether the parties to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the inquiry is whether the utterance of an agent * * * is receivable against the party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business, * * *— in such cases it is common to express this idea by saying that the declaration must be made as part of the *'res gesta'*; and if it is not so made, it is deemed to be *'res inter alias gesta'*. *Now it is obvious, on a*

*little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence is really to settle a question in the law of agency * * *—a question in substantive law."*

In other words, by excluding these conversations, the court decided that there was insufficient proof of authority of the alleged agents to bind the defendant World's Fair to warrant submission of the question of agency to the jury.

Upon the appeal, the Circuit Court of Appeals agreed with the trial judge that the alleged agents were not shown to have had authority to accept the bid (see p. 84 of opinion). In so ruling, we contend it affirmed two errors committed by the trial court: (1) it took from the jury the question of agency, a question of fact expressly reserved to it by the decision of the courts; (2) it decided the question of agency in favor of defendant when there was sufficient evidence from which it might have been inferred, as was the fact, that Mermey, Flanigan and Hemingway, each or all of them, acted within the scope of their employment in their dealings with the plaintiff.

The question of agency "is ordinarily a jury proposition which should not lightly be taken from them by the court where there is any substantial evidence, direct or circumstantial, tending to support the agency relied upon" (*Smith* v. *Texas Company,* 149 So. 585, 586).

Only, "where the material facts from which it (the agency) is inferred are not in dispute and only one reasonable conclusion can be drawn therefrom" is the question of agency one of law for the court to decide without submission to the jury (3 C. J. S. 325-326).

Mott v. *Consumers' Ice. Co.*, 73 N. Y. 543, 550;
Courtney v. *Baker*, 60 N. Y. 1, 5;
Gaillard Realty Co., Inc. v. *Manhattan Brass Co., et al.*, 238 App. Div. 84, 86.

In *Conant* v. *American Rubber Tire Co.*, 48 App. Div. 327, plaintiff was seeking to recover on an advertising contract signed "J. F. Aldrich, manager Columbiana Pneumatic Wagon Wheel Company". Defendant, in seeking to escape liability, asserted that Aldrich had no authority to sign this contract. Plaintiff called as his witness the president of the defendant corporation who testified that,

> "Aldrich was an employee, not an officer of the defendant, that he acted in a limited capacity as manager his duties being to solicit orders, oversee workmen and shipments, and make such little purchases as might be necessary to run the business from day to day, but that he had no authority to make a contract and was expressly prohibited from making such a contract" (pp. 328-9).

At the close of the evidence the court held, as a matter of law, that the contract was within the apparent scope of the authority of Aldrich, as manager of the defendant. On appeal, the Appellate Division reversed, saying (p. 330):

> "The trial court erred, we think, in holding as a matter of law that the defendant was bound by the contract. The question of ratification was, concededly, a question of fact for the jury. Ordinarily, the question whether a certain act is within the general scope of a servant's employment is for the jury to determine (*Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 550). The evidence in this case was not sufficient for the court to hold as a matter of law

that the contract was within the apparent scope of the employment of Aldrich."

There we have the reverse situation from the case at bar. In the case cited, no question was ever raised concerning the admissibility of evidence, showing the nature and extent of the authority of the alleged agent to act for his principal, but on the basis of the admitted evidence the court held that the defendant's manager had authority to bind him contractually. In the case at bar, not only was the plaintiff prevented from testifying concerning conversations had with the alleged agents to show the contract or to show the apparent scope of these agents' authority, but also an admission by the defendant World's Fair through its president, contained in his examination before trial, describing the nature of the authority of Hemingway to act for the corporation, was excluded.

Similarly, in the case at bar appellant urges that the court erroneously held, as a matter of law, that these agents were not authorized to bind the defendant World's Fair in their conversations with plaintiff's representatives. The error of the court here was even more serious, because not only did it decide the question of agency in favor of the defendants, in the face of admissions by the defendants' attorneys concerning the scope of the authority of Mermey, Flanigan and Hemingway, but the court went further in excluding any attempt on the part of the plaintiff to introduce evidence of the conversations between the plaintiff's representatives and the alleged agents, which, from the opening of plaintiff's counsel would have been some proof that Mermey, Hemingway and Flanigan were held out by the World's Fair as apparently authorized to bind the Fair in connection with its concession agreements.

Had the trial court admitted plaintiff's evidence of the conversations between its president and Hemingway, one of the counsel of the defendant World's Fair, and permitted the jury to consider the fact that Hemingway himself had prepared the contract for the concession, to be executed by the plaintiff and the defendant Fair, and to further weigh the testimony of the events which occurred at its legal department when all parties met to sign the contract, it would at least have established the conduct of these responsible and high officials of the defendant World's Fair, the circumstances under which they acted in its behalf and what they did in performance of their duties in behalf of the Fair in the acceptance of the plaintiff's bid. This evidence the jury could have considered in its determination of the question whether these officials had authority, or were held out with authority, to bind the defendant World's Fair in its relations with the plaintiff. In holding that the trial judge acted well within his discretion in excluding this testimony, it is urged that the Circuit Court committed error particularly in view of its own statement in the opinion (See p. 85):

> "Often it is better to admit evidence tentatively upon assurance that its competency will appear * * *"

B. Established Practice Justified the Admission of Proof of the Alleged Oral Agreement First and Consideration of the Question of Authority at a Later Stage of the Trial.

Decisions of the Supreme Court of the United States indicate that the practice regarding the admission of decla

rations of an agent is not as strict as the trial judge in the instant case, held.

In *First Unitarian Soc. of Chic.* v. *Faulkner, et al.,* 91 U. S. 415, an action was brought to recover compensation for work, labor and services rendered by architects at the request of the pastor of the appellant church. The contention was made that the pastor was not authorized in any way by the church to employ appellees as architects. The architects sought to introduce into evidence certain declarations of the pastor to the effect that he was so authorized. Objection was made by the attorney for the church, and the respondent's attorney stated to the court that they expected to prove that the pastor acted as the agent of the society and that the society had acquiesced in his acts. Upon that understanding the objection was overruled, the court remarking:

> "* * * the testimony would become material if the plaintiffs should subsequently give evidence to prove the agency of the pastor at the time of the interview with the business partner of the plaintiffs when the plans were submitted" (p. 417).

The architects recovered a verdict and the church appealed, contending that the court erred in admitting these declarations and admissions. The Supreme Court, through Mr. Justice Clifford, in affirming the judgment of the trial court, said:

> "Declarations of the pastor were not competent evidence, unless it was proved that he was the agent of the society, and that the declarations or admissions were made in respect to matters within the scope of

> his agency. *But it is not absolutely necessary that the proof of agency in every such case should be first introduced.* Except in special cases, it is the better practice that the foundation, in such a case, should be laid before the declarations or admissions are admitted; *but it is competent for the presiding judge, if in his judgment the ends of justice require it, to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved*" (p. 417).

In *Bank of the Metropolis* v. *Guttschlick,* 14 Pet. 19, 39 U. S. 335, 340 (cited with approval in *First Unitarian Society* v. *Faulkner, supra*), an action was brought on an agreement in writing by which the defendant had purchased a plot of ground in the City of Washington from the plaintiff bank executed by its president and cashier. The agreement was offered in evidence and received, although no evidence was given showing the authority of the agents who executed it to bind the bank. This failure was assigned as an error by the appellant. In dismissing this objection, the court said (p. 28):

> "Assuming, *argumenti gratia,* as we have before done as to this point, that the transaction was such that an authority was necessary to be proven, the objection resolves itself simply in a question of the order in which evidence was to be given. We think that there is nothing in it. It was as competent for the party to prove the authority after as it was before, giving the agreement in evidence."

C. The Trial Judge, in Dismissing the Complaint, Paid No Heed to the Opinion of Judge Bondy, Denying Defendant World's Fair's Motion for Summary Judgment, Which Was the Law of the Case.

Having refused to allow plaintiff to prove its causes of action, the trial court dismissed plaintiff's complaint for failure to establish a *prima facie* case (461). In his opinion dismissing the complaint, the trial judge showed clearly the confusion that pervaded his mind in ruling as he did upon the offers of proof. First of all, he stated that he "accepted as the law of the case the decision of Judge Bondy that an oral contract could be made" (458, 689-690). Then he referred to subdivision 7 of the "Information for Bidders", the document prepared by counsel for the defendant World's Fair for bidders for concessions, which stated in part,

> "the acceptance of a proposal will be a notice in writing signed by a duly authorized representative of the corporation, and no other act of the corporation shall constitute an acceptance of the proposal" (459).

Judge Bondy, in construing this document had stated in his opinion denying defendant World's Fair's motion for summary judgment, which the trial judge had accepted as law of the case, that,

> "It appears that this provision for written notice of acceptance was inserted by the defendant for its own advantage in the concession documents, which were part of plaintiff's bid. But apart from any question of waiver, if the defendant's oral acceptance of the bid be deemed a defective acceptance, it may be considered a counter-offer to which plaintiff manifested its assent" (689).

Having thus accepted Judge Bondy's opinion as law of the case, the trial judge then continued (460-1):

> "Surely it is contemplated *that a written binding agreement must be signed before either side shall be bound. No such agreement was signed* * * *
>
> Really from the opening of plaintiff's counsel itself, it appears plaintiff knew they had no contract because they knew that *it had to be in writing.*"

It is patent that the trial judge had concluded that unless the plaintiff proved a written contract, it had no case.

This the Circuit Court, in its opinion, did not follow, stating at page 85, that,

> "* * * acceptance did not as a matter of law have to be in writing."

However, by the trial judge's ruling, all evidence of oral conversations concerning the making of the alleged oral agreement between the representatives of the plaintiff and the representative of the defendant World's Fair was excluded.

Plaintiff was prevented from placing before the jury, any evidence of the conduct of the parties, whether by act or word, which would tend to prove the contract alleged in the complaint. This ruling was in direct contravention of Judge Bondy's opinion, which, under the established practice, sanctioned by the Supreme Court of the United States, the trial judge was bound to accept as law of the case, unless it was perfectly clear that the former decision was wrong in law, and that to follow its rule would work injustice to the parties (*Davis* v. *Davis*, 96 Fed. (2d) 512, 515, aff'd 305 U. S. 32; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *King* v. *West Virginia*, 216 U. S. 92, 100).

To the same effect see the New York rule, as established by: *Henry* v. *N. Y. Post Inc.,* 168 Misc. 247, aff'd no op., 255 App. Div. 973, aff'd no op., 280 N. Y. 842; *Aldrich* v. *Newburgh News Printing & Pub. Co.,* 70 Misc. 126, 127; *Title Guar. & Trust Co.* v. *Hoffheimer,* 170 Misc. 691.

Then perhaps, realizing his error, the trial judge continued by paying lip-service to the opinion of Judge Bondy (461-2):

> "Of course I appreciate the fact that an oral contract may be binding even though the parties may say that 'we intend to put it in writing,' and even without putting it in writing the contract may nevertheless be binding. *However, in this case there is no evidence that the parties with whom the plaintiff's representatives had conversations could bind the World's Fair corporation.*
>
> The motion to dismiss is granted."

The latter part of this statement, "there is no evidence that the parties with whom the plaintiff's representative had conversations could bind the World's Fair corporation", was made without basis in fact. The evidence which constitutes a sufficient preliminary showing of authority on the part of representatives of the World's Fair to act for this defendant, is set forth as follows:

1. MAURICE MERMEY was a member of the Pre-Qualifications Board (353); he was Acting Director of Exhibits and Concessions from December 31, 1937 to September 9, 1939, which includes February 1 and 2, 1938, the time when the alleged oral contract was entered into (354-5); he had power to sell all domestic exhibit space available for sale by the World's Fair (356); it was among his duties to plan and develop the plans for

various types of concessions held at the Fair (356), and to negotiate the various contracts for the concessions and exhibits (413).

2. COMMANDER HOWARD A. FLANIGAN was Administrative Assistant to the President, and subsequently became Executive Vice-President of World's Fair, his duties remaining substantially the same as before (365). He had general supervisory charge of the hamburger and frankfurter concession, which included the sale of coffee, tea and milk, and also, as Chairman of the Concessions Pre-Qualifications Board, he had a most intimate and executive control over this concession (368). The affidavit submitted by the defendant World's Fair in support of its motion for Summary Judgment, was the affidavit of Comm. Flanigan. In said affidavit, Flanigan described his authority as follows (80-81):

> "I am the Vice-President of the New York World's Fair 1939 Incorporated, one of the defendants in the above entitled action.
>
> On or about February 2, 1938, I was the Administrative Assistant to the President of the Fair and in that capacity was *responsible for the taking and consideration of bids for the concession involved in this action.* Accordingly, I am familiar with the circumstances surrounding the taking and rejection by the Fair of the plaintiff's bid."

This portion of the latter affidavit was sought to be introduced into evidence as an admission against the World's Fair, made by this defendant through its Vice-President, and also as an admission against Flanigan personally, of the nature and scope of his authority in accordance with Wigmore's Rule (4 Wigmore, Sec. 1078), but was excluded by the trial judge (404-9).

3. JAMES S. HEMINGWAY was a member of the law firm of Lord, Day & Lord, the attorneys for and with

offices at the legal department of the defendant World's Fair (337). It was among his duties in the Concession Department, to render sundry legal services, including the preparation of concession agreements (338). According to the testimony of Grover A. Whalen, President of the defendant World's Fair, given at his examination before trial, "It was in the line of Mr. Hemingway's responsibility to draw these (concession agreements) immediately after bids were received and accepted by the corporation (426). Plaintiff's counsel sought to introduce this testimony as an admission by the highest ranking officer of the defendant World's Fair of the nature and scope of the duties of a subordinate. But, this offer of proof was also excluded by the trial judge (426).

Substantially the same statement of facts as plaintiff offered to prove at the trial was set forth in the affidavit of Louis Golde, submitted in opposition to the motion by defendant World's Fair, for Summary Judgment, and was before Judge Bondy for his consideration, on that motion. Judge Bondy's opinion, in deciding this motion, reveals a sharp contrast from the ruling and the opinion of the trial judge in dismissing the case. Judge Bondy stated (690):

> "Moreover, a jury, crediting plaintiff's version of the discussion between the parties on February 2, 1938, might find that at that time the parties agreed upon all the terms of the agreement and accordingly entered into a binding contract, notwithstanding their failure to execute a formal written instrument."

This statement of the law is supported by a pronouncement of this Court, in *Martin* v. *Webb,* 110 U. S. 7 (cited

most recently with approval in *Kansas Educational Assn.* v. *McMahan,* 76 Fed. (2d) 957, 960). In that case this Court affirmed the decree below adjudging the acts of a cashier as binding upon a bank, stated at pages 14-15:

> "His authority (as cashier, to act for the bank) may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series or years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them."

Applying this rule to the case at bar, there was sufficient preliminary evidence of the authority of Maurice Mermey alone, to act for the World's Fair, to suggest a similar holding. Clearly, the question of his authority to enter into a concession agreement such as the one in the case at bar, should have been permitted to the jury. Indeed, from the decision above quoted, a jury might well have found that Mr. Mermey's authority to accept the plaintiff's bid for the hamburger and frankfurter concession might have

been "inferred from the general manner in which, for a period sufficiently long to establish a settled course of business he has been allowed without interference to conduct the affairs of the" World's Fair (*Martin* v. *Webb,* 110 U. S. 7, at p. 14).

See, also:

Sollows v. *McCann Erickson, Inc.,* 27 Fed. Supp. 491, 492 (D. C. N. Y. 1939).

D. The Burden to Show Lack of Authority Was on Defendant World's Fair.

Not only was the admitted evidence sufficient to satisfy the requirement of a preliminary showing of authority so that testimony concerning the making of the oral agreement between the representatives of the plaintiff and the representatives of the defendant World's Fair should have been admitted, but under the decisions of the highest New York courts, the burden of showing lack of authority on the part of the individuals, apparently acting on behalf of the defendant World's Fair, was upon the said defendant.

In *Lyon* v. *Westside Transfer Co.,* 132 App. Div. 777, the court said, at page 780:

> "Where a contract is one which the directors had power to authorize their officers to make, or to ratify it after it had been made, the burden was on the persons denying the contract to show that it was not authorized or ratified by the board:

See, also:

Patterson v. *Robinson,* 116 N. Y. 193.

In the case at bar, it can scarcely be contended that it was not within the power of the Board of Directors of the World's Fair to authorize Mermey, Flanigan and Hemingway to bind this defendant in a hamburger and frankfurter concession agreement, or to ratify such an agreement if made without express authority. Therefore, the burden was on the defendant World's Fair to show that its agents were not so authorized, and it is submitted that this defendant has not met its burden by the interposition of a bare-faced denial of authority.

II.

THE DISMISSAL OF THE COMPLAINT AS AGAINST DEFENDANT SWIFT AND COMPANY WAS PREDICATED UPON THE ERROR OF THE TRIAL JUDGE IN RULING UPON THE PLAINTIFF'S OFFERS OF PROOF.

The action against Swift and Company was predicated upon an intentional interference with contractual relations entered into between the plaintiff and the defendant World's Fair. Before the plaintiff could recover against the defendant Swift and Company for this alleged tort, it must have, perforce, established the contractual relationship between itself and the defendant World's Fair. (*DuRoy & LeMaistre Inc.* v. *Gillmore,* 246 App. Div. 37; aff'd no op., 272 N. Y. 454.)

It is submitted that because of the error of the trial judge in ruling upon the plaintiff's offers to prove the oral agreement between itself and World's Fair, which have been adverted to under I, *supra,* it became impossible for the plaintiff to establish the oral contract alleged in the com-

plaint, and therefore, its cause of action against the defendant Swift and Company, terminated prematurely.

From the opening of the plaintiff's counsel, it appeared that the case against Swift and Company was strongly buttressed by documentary evidence, consisting of telegrams and letters between Harvey Gibson, a member of the Executive Committee of the defendant World's Fair, and the Treasurer and Executive Vice-president of the defendant Swift and Company, substantiating plaintiff's claim of intentional interference with contractual relations.

Moreover, in denying plaintiff's petition for a rehearing, the Circuit Court, in failing to modify its order, directing the dismissal of the cause of action herein against the defendant Swift and Company, without prejudice, and not upon the merits, prevented the plaintiff from bringing an action against Swift and Company for malicious prevention of plaintiff's execution of a contract with the defendant World's Fair. In so doing, it is urged that the Circuit Court committed error.

Thus, it will be seen that the rulings of the trial judge had the effect of allowing the defendant World's Fair to avoid its contract liability with the plaintiff, and thus defendant Swift and Company was permitted to obtain the dismissal of the plaintiff's case against it, without presentation of the plaintiff's evidence of the alleged tort. The rulings of the trial judge prevented the plaintiff from proving its contract, and from proving the tort of intentional interference with that contract.

Therefore, had proof of the oral contract between plaintiff and the defendant World's Fair, been admitted, plaintiff could have proceeded to establish its case against the defendant Swift and Company for interference with its contractual relations with the Fair.

CONCLUSION

Not only did the rulings of the trial judge work a great injustice to the rights of the plaintiff in this action, but its effect transcends this litigation and places in jeopardy, the rights of all persons who deal with large corporations through their titled officials. If the judgment of the trial court is to become law, a corporation will be permitted to insulate itself from contract liability by allowing its titular heads to hold themselves out as apparently authorized to bind the corporation in contracts but always reserving for itself, the privilege of breaching the contract and of defeating the efforts of the party, relying thereon, merely by coming into court and objecting to proof of the contract, on the ground of lack of authority. On the other hand, should the corporation feel that the contract is advantageous it may obtain enforcement of it to the letter, by claiming that their agents were duly authorized. This provides discouragement to all those who, relying upon handsome offices and high-sounding titles, risk their wealth, time, and effort, in negotiating for future commitments, for, although those in the position of this plaintiff may become obligated to carry through their agreement, those in the position of the defendant World's Fair, may avoid their obligation with impunity.

Similarly, those who intend interfering with apparent contractual relations entered into between large corporations, may rest secure in the knowledge that they will not be called to account for their tortious acts unless a written contract signed and sealed on behalf of the corporation by someone higher in authority than the Executive Vice-president is produced at the trial.

FOR THE REASONS STATED IN THE PETITION AND IN THIS BRIEF, IT IS RESPECTFULLY SUBMITTED THAT THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, April 6, 1942.

Respectfully submitted,

ALEXANDER PFEIFFER,
Attorney for Petitioner,
Franham Distributors, Inc.

Office - Supreme Court, U. S.
FILED
MAY 11 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1941

No. 1143

FRANHAM DISTRIBUTORS, Inc.
Petitioner

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED
and SWIFT & COMPANY
Respondents

BRIEF OF RESPONDENT SWIFT & COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOWELL WADMOND
Counsel for Respondent Swift & Company

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Of Counsel

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Preliminary Statement

The petitioner seeks a writ of certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit, to the end that the affirmance by the Circuit Court of Appeals for the Second Circuit of the judgment of the United States District Court for the Southern District of New York may be reviewed here. The action was brought by Franham Distributors, Inc., against New York World's Fair 1939 Incorporated, to recover damages for alleged breach of contract, and against Swift & Company to recover damages for allegedly inducing the breach of the alleged contract. The action was commenced February 25, 1938, in the New York Supreme Court. On May 11, 1938, it was removed to the Southern District of New York. A

first trial was commenced on June 17, 1940, and on June 24, 1940, petitioner moved for non-suit on the ground it was not prepared to prove damage, and plaintiff's motion for non-suit was granted over objection by defendants. The case again came on for trial on October 7, 1940, and on October 10, 1940, at the conclusion of plaintiff's proof, was dismissed for failure to establish a *prima facie* case. The United States Circuit Court of Appeals for the Second Circuit affirmed with a decision written by Circuit Judge CHASE on December 8, 1941 [124 Fed. (2nd) 82]. Application for a rehearing was denied on January 8, 1942.

There is no question of Federal law. There is no question of a conflict with a decision of another Circuit Court of Appeals. None of the reasons set forth in Rule XXXVIII, 5 (a) and (b), is present in this case. The sole question presented to this Court is whether or not the plaintiff had proved implied or apparent authority on the part of two employees of, and an attorney for, New York World's Fair 1939 Incorporated, to waive the requirements of the Specifications of the Fair and the Bid of the plaintiff that all concession contracts must be in writing executed by a duly authorized officer of the Fair, and had proved that these two employees and a lawyer for the Fair had implied or apparent authority to enter into an oral contract for the operation of the hamburger and frankfurter concession. The District Court ruled that there was no evidence of implied or actual authority on the part of these three persons to waive the requirement that the contract be in writing or to enter into an oral concession contract, and the Circuit Court of Appeals affirmed this ruling on the facts. The opinion of the Circuit Court of Appeals for the Second Circuit by Circuit Judge CHASE [124 Fed. (2nd) 82] sets forth so accurately and concisely the questions presented on appeal by petitioner, and the answers thereto, that for the convenience of this Court a copy of the opinion is appended hereto.

The following language from Judge CHASE's opinion shows the precise nature of the question involved and, by the same token, makes obvious the reasons why certiorari should not be granted. *Inter alia* Judge CHASE wrote:

> "But where a bidder had been previously informed, as this plaintiff had been, that the only binding acceptance of a bid would be a notice in writing signed by a duly authorized representative of the Fair it was bound to know that any other mode of acceptance would be a departure from that prescribed and ostensibly unauthorized. The plaintiff was, accordingly, also bound to take suitable steps to ascertain the actual authority of those with whom it undertook to deal in a manner other than that which it had been informed was essential to the making of a valid contract. The unperformed duty of inquiry may, and often does, make it impossible to rely upon any so-called apparent authority of an agent. * * *
>
> "Moreover, here there was nothing to induce any belief on the part of the plaintiff's representatives that any of the men with whom they talked at the offices of the Fair in the Empire State Building intended to vary in any way the stated requirements for the binding acceptance of a bid by the Fair. The contract which had been prepared showed on its face that it was to be executed by the Fair, if at all, by someone other than any of them. * * * Since the plaintiff based its cause of action upon an oral acceptance of its bid before the formal rejection of all the bids, it was necessary for it to show that the men with whom it dealt had authority to accept its bid as it claims they did. * * * The evidence offered and received clearly fell short of providing the required proof and unless there was error in the exclusion of evidence the plaintiff sought to introduce the judgment must be affirmed.
>
> "* * * The judge, however, repeatedly assured the plaintiff's attorney that any evidence of agency he offered would be received and was well within the realm of sound discretion in being insistent that some of such proof precede the introduction of any so-

called admissions of the alleged agents. At most they were special agents who could not bind their principal by declarations, or what are sometimes called admissions, as to the scope of their authority. That had to be proved otherwise than by their own representations. * * * Furthermore, there is no reasonable cause for believing that the plaintiff could have shown any such declarations or admissions if answers to the excluded questions had been taken."

The United States Supreme Court, therefore, is being asked to issue a writ of certiorari, not to review a conflict between the different circuits, or a question of Federal law, or a question where a state court has decided a Federal question of substance not theretofore determined by this Court, or where a lower court has decided an important question of local law in a way in conflict with applicable local decisions, or an important question of Federal law which has not been settled by this court, or any of the other generic questions set forth in Rule XXXVIII, 5 (a) and (b), but is merely being asked to review the record on the facts to see whether or not the record discloses any evidence of implied or apparent authority on the part of these two employees and a lawyer for the Fair to enter into an oral contract, where the specifications of the Fair and the bid of the petitioner specifically provided that there would be no contract until made in writing and duly signed by an authorized officer of the Fair. The United States District Court for the Southern District of New York and the United States Circuit Court of Appeals for the Second Circuit held that there was no evidence of such implied or apparent authority and that alleged conversations as to the alleged making of an alleged oral contract were not admissible. The Supreme Court of the United States is now asked to be the third Federal court to pass upon this elementary question of evidence.

Statement of Facts

The complaint alleged two causes of action. The first was against New York World's Fair 1939 Incorporated and alleged that plaintiff and World's Fair entered into an oral contract concerning the operation by Franham of the frankfurter and hamburger concession, that World's Fair, despite the alleged ability and willingness of plaintiff to perform and despite alleged performance by plaintiff of all its promises to perform except as prevented by World's Fair, breached its contract by refusing to execute the agreement in regard to the frankfurter and hamburger concession. The second cause of action was against Swift & Company and alleged that while the alleged agreement between Franham and World's Fair was in full force and effect, and with full knowledge of the existence of said agreement, Swift & Company intentionally and knowingly and without justification or excuse, and for the purpose of obtaining for itself the said concession, induced World's Fair to breach its contract with Franham.

In answer to the first cause of action, World's Fair denied that any contract between it and Franham had been made, and that even if such a contract had been made and breached, Swift & Company did not induce the breach. In addition, World's Fair pleaded eight separate and complete defenses to the first cause of action: (1) that no lease was made in writing; (2) that no interest in land was created in plaintiff by any instrument in writing; (3) that the alleged concession agreement was not to be performed within one year and that neither the concession agreement nor any memorandum thereof was made in writing; (4) the printed Booklet of Concession Documents expressly provided that acceptance of a Proposal was to be in writing signed by a duly authorized representative of the Fair and that no other act of the corporation could constitute acceptance of a Proposal, and that

the Proposal of plaintiff was never accepted in writing; (5) the Booklet of Concession Documents provided in four places that the World's Fair reserved the right to reject any Proposal and that on or about February 22, 1938, World's Fair rejected all Proposals including bid of plaintiff; (6) the Booklet of Concession Documents expressly required bidder in its declaration to state names of all persons interested in its Proposal, but plaintiff's declaration was not an accurate statement as to persons interested in its Proposal; (7) the Booklet of Concession Documents provided that the Fair reserved the right to reject all Proposals and that the World's Fair could reject the Proposal of any bidder whose financial condition, organization and management did not appear adequate, and that the Proposal of plaintiff was rejected because the financial condition, organization and management of plaintiff did not appear adequate to World's Fair; (8) the Booklet of Concession Documents provided that World's Fair reserved the right to reject all Proposals if at any time prior to the acceptance the financial condition or organization or management of bidder was materially changed, and Proposal of plaintiff was rejected because it appeared to the satisfaction of World's Fair that after the filing of the bid the plaintiff's financial condition, organization and management had materially changed. The answer of Swift & Company on information and belief denied that Franham and World's Fair had entered into any such alleged contract and denied that Swift & Company had induced a breach thereof. Subsequently it was stipulated that Swift & Company's answer be amended to include the eight affirmative defenses pleaded by World's Fair.

The "Facts" as set forth in the petition and brief of petitioner, other than the somewhat inaccurate recital of the preliminaries leading up to the filing of bids, are almost entirely unsupported by evidence. They are based quite largely on opening statements of plaintiff's counsel

to the jury and on statements of Louis Golde, President of plaintiff, in an affidavit submitted in opposition to a motion for summary judgment, which affidavit, while included in the record before the Circuit Court of Appeals by stipulation of the attorneys for the respondents, was not before the trial court. Thus plaintiff's "Facts" by and large are mere statements of claim unsupported by testimony or evidence. Just as these "Facts" are unsupported by testimony in the record in the second trial, from which this appeal comes, so are they almost equally unsupported by the record in the first trial, other than plaintiff's oral testimony, in which first trial plaintiff prayed for non-suit because of its inability to prove damage. In neither trial have defendants had occasion or opportunity to put in their evidence or to deny from the witness stand the unsupported claims of plaintiff's openings to the juries. Moreover, the so-called facts recited by petitioner in its statement of facts, aside from the preliminaries leading up to the filing of bids, are also largely unsupported by any testimony given on the examinations before trial, with one or two minor exceptions, and were not before the trial court.

Since petitioner's statement of facts, other than as to the preliminaries leading up to the filing of bids, alleges matter almost entirely unsupported by evidence before the trial court, and is based largely on the impassioned claim of counsel "from memory" (f. 224) to the jury, said statement serves no purpose other than to window-trim the plaintiff's petition. We, therefore, deem it unnecessary to reply to such statements other than to traverse and deny most emphatically, vigorously and affirmatively the accuracy of such statements.

Swift & Company did not induce the breach of any alleged contract, and there is absolutely no testimony that it did, either in this record or in the record of the first trial. There is none in the examinations before trial of Swift & Company or World's Fair, and no such testimony

could ever find its way into the record on this controversy, for no such testimony or facts exist. To answer plaintiff's statement of alleged facts, or rather the condensation of the opening of plaintiff's counsel to the jury, which has been glossed up as facts, would require us to go outside this record, outside the record of the earlier trial failure by this plaintiff, and into examinations before trial—all outside the record before this court. This we deem both improper and immaterial as well as an imposition on this court. Consequently we refrain from replying specifically and seriatim. We must, however, point out as an illustration one such gross exaggeration and, indeed, misrepresentation. On page 7 of the petition it is stated that Mr. Harvey Gibson and Mr. Traynor, Treasurer of Swift & Company, are old and intimate friends and that Swift & Company is one of the largest depositors of Manufacturers Trust Company. There is no such testimony in this record, the record of the previous trial, or in any of the examinations before trial. As a matter of fact, Gibson testified when examined before trial that he knew Mr. Traynor, the financial Vice-President of Swift & Company, only in the same relationship that he knew thousands of depositors of Manufacturers Trust Company, and that he always addressed him as "Mr. Traynor." This would certainly indicate no "intimate" relationship. While Swift & Company is a depositor of Manufacturers Trust Company, and probably a large one, there is no testimony anywhere of it being one of the largest. However, to go on replying to plaintiff's statement of alleged "facts," practically all of which are *dehors* the record, serves no necessary purpose, and we only re-emphasize our emphatic and somewhat indignant denial of the alleged "facts" contained in plaintiff's petition and brief.

Since the latter part of 1936 defendant World's Fair had contemplated a frankfurter and hamburger concession for the Fair, a concession which involved the mainte-

nance of a great many stands throughout the Fair for the sale of frankfurters, hamburgers, coffee, tea and milk. The policy adopted by the Fair was to have a Concessions Pre-Qualification Board examine Information Returns submitted by various applicants for the concession.

The Information Return submitted by plaintiff is dated December 10, 1937 (fol. 477), recites the incorporation of plaintiff December 9, 1937 (475), but states that it had been in its then business for fourteen years (470), had operated concession privileges at five different places (470), was then engaged in the operation of food concessions at eight different places (469), and that the concessions had been operated by Tom D. Trulis (470). The Return is signed "Franham Distributors, Inc., by Tom D. Trulis, President" (477), and states that Trulis was President, Morris Golde was Vice President and Secretary, and Louis Golde, Treasurer (475, 476).

After the Concessions Pre-Qualification Board of the Fair, of which Commander Flanigan and Mr. Mermey were members, had examined the information submitted by plaintiff and others, approximately seventeen applicants were recommended for approval. To these the Fair issued Invitations to submit bids.

The Invitation, together with the terms and specifications of the bid are attached to the World's Fair answer as Exhibits B and B-1 and are printed in the record as Plaintiff's Exhibit 5 (69, 70, 502-645). Exhibit B consists of the Booklet of Concession Documents for the frankfurter and hamburger concession (507) and is dated December 20, 1937. Exhibit B-1 consists of a Supplement Sheet No. 1 dated December 28, 1937 (503). Both of these were furnished by defendant World's Fair to plaintiff as a bidder which had prequalified.

The Booklet of Concession Documents contained a table of contents which described the various parts of the Booklet (508). In the Booklet there were Notice to Prequalified Applicants (511), Information for Bidders (518),

Specifications (529), Proposal (546), and Specimen Form of Proposed Concession Agreement (565), to be entered into between the successful bidder, if any, and World's Fair. Across the face of the specimen contract there was stamped the word "Specimen".*

The Notice stated that sealed Proposals for the frankfurter and hamburger concession would be received by the Fair until noon February 1, 1938, and contained a general description of the concession, which, the Notice stated, was "outlined in the Concession Specifications" (511, 512). The Notice also stated that "All Proposals must be made upon the blank forms herewith provided", and "The Corporation reserves the right to reject any or all Proposals" (513).

The Information for Bidders set forth in the Booklet of Concession Documents, like the Notice, provided that the Fair had the right "to reject any or all Proposals" (521); and made a very definite provision as to the manner of acceptance of a Proposal. It expressly provided that (524, 525):

> "The acceptance of a Proposal will be a notice in writing signed by a duly authorized representative of the Corporation, *and no other act of the Corporation shall constitute the acceptance of a Proposal.*" (Italics added.)

The Specifications contained, *inter alia*, information as to the operation of frankfurter and hamburger stands, as to the location of the units, their construction and equipment, various rules and regulations, and the requirements as to payments to the Fair, participation percentage and debenture bonds. The Proposal or bid was to be filled in wherever their appeared blanks which required information.

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* The words "The following consists of a specimen contract with the word 'specimen' stamped across the face," which appear at 502 should not be printed at 502 but at 565.

Among the Proposals received was that of Franham, which stated that Franham Distributors, Inc., 522 Fifth Avenue, New York City, and Louis Golde and Morris Golde, of the same address, were the only persons interested in the Proposal (546-9), and was signed by Franham Distributors, Inc., by Louis Golde, President (559). Whereas Franham Distributors, Inc., had prequalified on the basis of Mr. Trulis' alleged fourteen years' experience, Franham was making its Proposal or bid for the concession without any provision binding it to utilize Mr. Trulis' alleged experience. As mentioned by counsel for plaintiff in his opening to the jury, Trulis resigned as President of Franham because he had "to be traveling to his restaurants at tracks at that time, and so on" (188).

By the terms of the Proposal, both the provisions of the Notice to Pre-qualified Applicants and the Information for Bidders became a part of the Proposal (554). It appears, therefore, that the provision in the Information for Bidders that a Proposal could only be accepted by a notice in writing signed by a duly authorized representative of the Fair, and that no other act of the Fair could constitute acceptance of a Proposal became a part of plaintiff's Proposal and there thus was clearly notice to plaintiff that a Proposal or bid could be accepted in no other way.

With this documentary background as a basis, plaintiff endeavored to introduce testimony of two alleged conversations for the purpose of establishing an oral acceptance of the Proposal. The first of these is alleged to have occurred on February 1, 1938, and is claimed by plaintiff to have been between Mr. James S. Hemingway, a member of the law firm of Lord, Day & Lord, of legal counsel to the Fair, not an officer or employee of the Fair and Mr. Louis Golde, President of plaintiff. The second is alleged to have occurred on February 2, 1938 between Mr. Hemingway, Mr. Maurice Mermey, acting Director of Concessions for the Fair, and Commander Howard A. Flanigan, at that time administrative assistant to the President of the

Fair, on the one hand, and Mr. Louis Golde, President of plaintiff, Mr. Max Natanson [who apparently was interested in the concession (309-10, 341) but whose name nowhere appears in either the Bidder's Information Return (466) or in plaintiff's Proposal (503-64)] and Julius Zieser, attorney for Franham at that time.

When plaintiff sought to introduce evidence as to these alleged conversations, the Court on objection excluded such testimony on the ground that there had been no showing that either of the aforementioned employees of the World's Fair or Mr. Hemingway, as its counsel, had been given authority by the World's Fair to waive the terms of the Proposal or to enter into an oral contract. (See 335-462, at 374 and 383.)

The pertinent portions of the record are found in folios 336 to 462. These folios demonstrate that the position of the Courts below was that it was incumbent upon the plaintiff to prove that one or more of these three men had express, apparent, or implied authority from the Fair to waive the stipulation in the Proposal that acceptance of a Proposal could only be in writing, and that one or more of them had authority to bind the Fair by an oral agreement.

Plaintiff relies for the authority of these men on concessions made by counsel for the Fair in the folios last above mentioned (336-462), and admits that it has no proof of authority beyond such concessions (447, 455). Commander Howard A. Flanigan at the time of the making of the oral contract on February 2, 1938, was administrative assistant to the President of the Fair (80, 99, 442). He was not the executive Vice-President of the Fair at that time, as plaintiff's petition and brief at numerous places seeks to imply. He was chairman of the Concessions Pre-qualification Board, and in that way had an intimate supervision of this and other concessions (368). Mr. Maurice Mermey at the time in question was the acting Director of Exhibits and Concessions (354). Among his

duties was to plan and develop the plan for the various types of concessions to be had, and to sell all of the domestic exhibit space (356). On page 14 of the petition it is stated that one of his duties was "to negotiate various contracts for concessions and exhibits." That is not so. Nowhere in the record is there any such testimony or stipulation. The folios cited by plaintiff on page 14 do not so state. In fact, they state quite the contrary (356-60). The fact that Mermey had no power to negotiate contracts appears specifically at folios 344, 356-63, and 413.

On page 15 of plaintiff's brief it is stated that:

> "Counsel for the plaintiff then offered to prove, in addition to what had gone before, that Mr. Mermey had authority to sell all of the domestic exhibit space to be sold *and to negotiate the various contracts for the concessions and exhibits* (413). *The court then noted that it considered this matter already proven* (413)." (Italics ours unless otherwise noted.)

This statement of counsel is either gross carelessness or deliberate misstatement. It was made by petitioner in these same words in its brief before the Circuit Court of Appeals, and its patent factual inaccuracy was pointed out in our answering brief in the Circuit Court of Appeals. To the same effect, at pages 14 and 38 petitioner says that it was among Mermey's duties "to negotiate the various contracts for the concessions and exhibits." The record at the folios in question reads as follows (411-14):

> "Mr. Pfeiffer: I offer to prove that Mr. Mermey, Maurice Mermey, was the director of exhibits and concessions; that his duties among others were to plan and develop the plan for the various type concessions to be had, to sell all of the exhibit space to be sold, that is, all of the domestic exhibit space exclusive of government space, to negotiate the various contracts for concessions and exhibits, and that he had that authority beginning with some time in January and continuing beyond the month of February——

The Court: Well, I haven't excluded any proof of his authority; if you want to show his authority I will be glad to receive it. Is that any different than the stipulation?

Mr. Pfeiffer: Yes.

The Court: In what respect?

Mr. Pfeiffer: There is this: He says here that he had authority to sell [all?] of the exhibit space to be sold, that is, all of the domestic exhibit space.

The Court: You have proved that.

Mr. Pfeiffer: Exclusive of government space, to negotiate the various contracts for concessions and exhibits, and that he was a member of the Pre-Qualifications Board, yes, sir. *That is, Mr. Daly did not go to that extent.*

Mr. Daly: I think that is all in the record.

Mr. Pfeiffer: All right. *Do you concede it to that extent?*

Mr. Daly: *No.* I concede what I conceded before. I can't go on conceding here, your Honor. I have made my concessions.

The Court: Is there any other proof you want to offer? Proceed.

Mr. Pfeiffer: I cannot offer any other proof at this time if you find——"

Despite the repeated assertion by the Court that the Court was willing to take any further proof that plaintiff had to offer to show express, apparent or implied authority on the part of Commander Flanigan, Mr. Mermey or Mr. Hemingway to make an oral contract, plaintiff offered no proof, and in fact stated that he had none (412, 414, 434, 436, 444, 445, 447-50, 455).

Mr. Hemingway was a member of Lord, Day & Lord, attorneys for the Fair. The concession with respect to him was that as a member of the firm of Lord, Day & Lord he was doing legal work for the Fair and that one of his duties was to draft all the contracts in the concessions department and render other legal services (337-8).

With respect to Mr. Hemingway, plaintiff claims it was reversible error for the Court to not admit the fol-

lowing answer given by Mr. Grover Whalen on examination before trial:

> "A. I don't know as I had any definite knowledge that this specific concession agreement was drawn except that it was in the line of Mr. Hemingway's responsibility to draw these immediately after bids were received and accepted by the corporation".

But Mr. Whalen specifically stated that he had no knowledge of this specific proposed concession agreement, which completely negatives any inference of an acceptance of the alleged contract by the Fair prior to the drafting of the proposed agreement by Hemingway, or of authority in Hemingway to speak for the Fair. Moreover, as Judge CHASE pointed out, "When Hemingway generally drew such contracts was obviously irrelevant to the question of his or Mermey's or Flanigan's actual authority to accept plaintiff's bid."

The plaintiff also assigns as error the refusal of the Court to admit Plaintiff's Exhibit 9 for Identification (404-10), which is an affidavit by Commander Flanigan reciting that on February 2, 1938 he was the administrative assistant to the President, "And in that capacity was responsible for the taking and consideration of bids for the concession involved in this action. Accordingly, I am familiar with the circumstances surrounding the taking and rejection of the Fair of the plaintiff's bid". But it is obvious that "taking and consideration of bids" does not include authority to *waive* the stipulation between the Fair and plaintiff contained in the Proposal that acceptance of a Proposal must be in writing signed by a duly authorized representative of the Fair and that no other act of the corporation shall constitute acceptance. The specimen contract itself, which formed a part of the Booklet of Concession Documents (507-645), specifically and in writing showed who such "duly authorized representative" of the Fair was to be, for the specimen contract indicated

that all concession contracts were to be executed for the Fair by Mr. Grover A. Whalen (639), its President, and the form of verification attached to the specimen contract had Mr. Grover A. Whalen's name printed in it, as President of the Fair, and as the person who would execute the contract on behalf of the Fair.

It is respectfully submitted that a reading of folios 336 to 462 will show the complete absence of error in this record and will demonstrate that the court time and again requested and suggested that plaintiff go forward with evidence, if there were any, to show that these men, or any of them, were authorized to act in the making of a contract for the World's Fair, to show that there was a course of conduct by the World's Fair with respect to other matters where oral contracts had been made, to show that there was ratification of any unauthorized act—in other words, any testimony that would indicate that these men or any of them had power to bind the Fair (444). The criticism on pages 17 and 35 of the petition of the oral opinion of the trial court (460) dissipates into thin air when read in its entirety in the record.* The real fact of this case is that there is no evidence of any authority, express, apparent or implied, on the part of any of these gentlemen to waive the provisions of the Proposal regarding the manner in which the Fair could be contractually bound, or to bind the Fair by an oral contract, despite the court's repeated suggestion that such evidence, if any, be adduced by plaintiff; and it was for that reason that the complaint was properly dismissed.

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* In the quoted language from the trial court's opinion as printed on page 17 of the petition, the word "authorities" is in error. It should read "parties."

POINT I

Even if plaintiff was the highest bidder and was so informed, that of itself would not give rise to a contract with defendant World's Fair.

As was pointed out above, the World's Fair in the Notice and in the Information for Bidders which was expressly made a part of the Proposal expressly reserved the right to reject any or all Proposals (513, 521), and plaintiff was therefore put on notice that regardless of whether or not it was the high bidder the Fair might reject its Proposal.

Moreover, as a matter of general authority the mere fact that a person submits the highest bid does not of itself give rise to a contract.

> *Ewing* v. *Mayor, etc., of New York,* 131 N. Y. 133 (1892);
> *Williston on Contracts* (1936), Sec. 31.

In *Leskie* v. *Haseltine,* 155 Penn. 98 (1893), where the defendant told the plaintiff bidder, "You are the lucky man," the Court held this statement merely showed defendant's recognition of the fact that plaintiff was the lowest bidder but did not bind defendant to enter into a contract with plaintiff. A similar result was reached in *Cedar Rapids Lumber Co.* v. *Fisher,* 105 N. W. 595 (Ia. 1906), where defendant told plaintiff, "You are low bidder. Come on morning train."

It thus becomes apparent that a mere statement on the part of Mr. Hemingway, Commander Flanigan or Mr. Mermey to the effect that Franham was the high bidder could not of itself be sufficient to establish an oral acceptance of the bid, even assuming that they or any one of them had been authorized to enter into such oral contract.

POINT II

Plaintiff must prove actual authority on the part of the Fair's representatives to accept the proposal.

Plaintiff claims only an oral acceptance of its Proposal (152, 153). The Information for Bidders, however, specifically provided that a Proposal could be accepted *only* by a notice in writing *signed* by a duly authorized representative of the Fair. This Proposal was signed for plaintiff by Louis Golde as President, and he was clearly on notice of this provision in the Information, which was made a part of the Proposal.

There is no question but that a corporation may protect itself against unauthorized oral contracts by providing in an application or contract form furnished by it that the proposal or bid to be made by a prospective customer or bidder will become a contract only when accepted by certain representatives of the corporation in writing.

> *Payne* v. *Yonkers Electric Light & Power Co.*, 147 App. Div. 682 (2nd Dept. 1911);
> *Goldberger, et al.* v. *Morris*, 94 N. Y. S. 359 (Sup. Ct., App. Term, 1st Dept. 1905).

In the first case there was a clause in an application for electric service, and in the second case a clause in a form of service contract, both of which clauses stated that only authorized agents could accept the offer. The Court held in each case that the limitation prevailed and that there was no binding contract until it was affirmatively shown that such a representative had signed the contract. The Court said in *Payne* v. *Yonkers Electric Light & Power Co., supra,* at page 684:

> "The application was not accepted according to its terms, and no agreement was executed by defendant.

> The plaintiff knew the terms of the instruments. He relied upon the alleged oral statement by Kugler or Fuller or both. Yet he knew that the defendant could not be so bound, inasmuch as he had stipulated that the agreement should not be binding until accepted by an executive officer, and that there should not be any modification of it by an agent or employee of the company, 'unless incorporated in writing herein before such acceptance.' "

Plaintiff was on full notice by the World's Fair that acceptance of the Proposal could only be by a *duly authorized* representative in *writing*. This obliged plaintiff to ascertain for itself the authority of the persons with whom it might deal, and it could not rely upon an alleged informal oral acceptance. The Fair was a public venture involving many hundreds of contracts and concessions in which the Federal Government, many of the states and the City of New York had invested public funds. It should have been obvious to those dealing with the Fair that a Proposal for one of the principal concessions could not be accepted in the offhand manner suggested by the plaintiff, especially in view of the specific notice that "the acceptance of a Proposal will be a notice in writing signed by a duly authorized representative of the Corporation, and no other act of the Corporation shall constitute the acceptance of a Proposal."

Admittedly Louis Golde was a man of many years of business experience (303-304). In fact, Mr. Golde testified (303-304) that he had been engaged in active business from 1889 to 1933. Surely a man of his experience should have known that such an important contract as the one for the operation of the hamburger and frankfurter concession of the World's Fair must of necessity be signed by a duly authorized representative of the Fair. As the Court, per CRANE, *J.*, said in *Union Car Advertising Co.* v. *Collier*, 263 N. Y. 386 (1934), at page 390:

> "We cannot imagine a man of Mr. Wineburgh's experience in the advertising business relying upon the representations of a general manager contrary to the express terms of the contract he was about to sign. He must have known that Dana had no power or authority to vary the written contract."

Plaintiff is not entitled to rely upon any so-called apparent or implied authority, which in some instances arises from the position of officers of a corporation with whom a third party deals. The law is well settled on this point, that one may rely on such "apparent" or "implied" authority only in cases of estoppel or *where there is no reason for inquiry as to the authority of the officer dealt with.*

As was stated in *Walsh* v. *Hartford Fire Insurance Co.*, 73 N. Y. 5 (1878), by ANDREWS, *J.*, at pages 10-11, the rule is:

> "The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal. (*Clark* v. *Metropolitan Bank*, 3 Duer, 248; Story on Agency, § 127; *Howard* v. *Braithwaite*, 1 Ves. & B., 209; *Stainer* v. *Tysen*, 3 Hill, 279; *Barnard* v. *Wheeler*, 24 Me., 279.) The doctrine is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. If, however, a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of or an abuse of the authority actually conferred, then manifestly the principal is not bound, and it is imma-

> terial whether the agent is a general or special one. The principal has the unqualified right, as between himself and the agent, to define and limit the agent's authority; to invest him with large or with restricted powers only. The agent, as we have seen, may sometimes bind the principal, although he transgresses his instructions, provided his apparent authority extends to the act done, but this is a rule of protection only."

In the present case Franham knew that the Proposal which it had in its hands and which it filled out could only be accepted in writing by a duly authorized agent of the Fair. This being so, they were under a duty of inquiring as to whether or not Hemingway, Flanigan or Mermey had ever received any authority to accept the contract either in writing or orally. The record shows no evidence of any such inquiry and, in fact, as was admitted on the trial of this case, there was no such inquiry.

In *Marvin* v. *Universal Life Insurance Co.*, 85 N. Y. 278 (1881), the Court said at page 282:

> "But a decisive difficulty remains. The policy contained an express provision that any alteration or waiver of its conditions, 'unless made at the head office, and signed by an officer of said company, shall not be considered as valid.' Granting, therefore, that Henkle was shown to be a general agent of this company; granting also what was not proved, but perhaps may be inferred from the character of his office (*Carrol* v. *Charter Oak Ins. Co.*, 1 Abb. Ct. App. 318; *Sheldon* v. *The Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 465), that he had authority, unless restricted, to waive conditions; the difficulty remains that he was in that respect restricted, and his authority limited and curtailed, by an express provision in the policy itself, thus brought to the knowledge of the assured, and, therefore, had no power, in and of himself, to waive the condition of payment, or agree that it should be waived."

See also

Bickford v. *Menier*, 107 N. Y. 490, 494 (1887).

In *Cullinan* v. *Bowker*, 180 N. Y. 93 (1904), the Court, per GRAY, *J.*, said at page 97:

> "Reference is made by the appellant to decisions in cases arising upon contracts of insurance and they furnish many illustrations of the extreme lengths to which the courts have gone in enforcing the liability of insurance companies, upon obligations created for them by their agents with an apparent disregard of the conditions imposed upon the exercise of their powers. However far those decisions have gone, in this court, certainly, I think I am safe in observing that there has steadily been an observance of this qualification, that, if the limitations upon the agent's authority to act are known to the person with whom he is dealing, or if the transaction is such as to charge him with the duty of inquiring into the extent of the agent's authority to do the particular act, the principal will be protected, if the act be unauthorized, or in clear excess of the agent's powers, and if the principal be an innocent actor in the transaction."

In *Drennan* v. *Sun Indemnity Co.*, 271 N. Y. 182 (1936), the Court, per LEHMAN, *J.*, said at pages 186-187:

> "The company is bound by any acts or representations of its agents within the scope of this apparent authority. Secret limitations will not avail where the company holds out its agent as having plenary authority; but where the company gives to an assured notice of a limitation upon the authority of an agent, the assured can hold the company upon an agreement made by the agent in disregard of such limitations only where it is shown that the company has removed the limitations.
>
> We have said long ago that 'the effect of such stipulations in a contract of insurance as well as the manner in which they may be modified or waived by agents of the company have been so thoroughly dis-

cussed, and so clearly pointed out that a reference to some of the more recent cases on the subject is all that is needful here. (*Allen* v. *German Am. Ins. Co.*, 123 N. Y. 6; *Quinlan* v. *Providence W. Ins. Co.*, 133 id. 356; *Messelback* v. *Norman*, 122 id. 583; *Walsh* v. *Hartford Ins. Co.*, 73 id. 5.) Under the doctrine of these cases, we see no escape from the result which the parties to the contract stipulated should follow the breach of the condition, with respect to subsequent insurance, unless consent was given in the manner provided.' (*Baumgartel* v. *Providence-Washington Ins. Co.*, 136 N. Y. 547, 551.)

It is true that we have also held that the insurance company may itself waive any contractual condition or restriction in a policy; even the condition that a waiver, extension or change must be in writing. Such waiver may be established by a course of conduct which gives rise to an estoppel or by word or act of a duly authorized agent. (*Pechner* v. *Phoenix Ins. Co.*, 65 N. Y. 195; *Manchester* v. *Guardian Assur. Co.*, 151 N. Y. 88; *Smaldone* v. *President, etc., of Insurance Co. of North America*, 162 N. Y. 580.) That does not mean that the provisions of a policy limiting the powers of an agent, or restricting the manner in which the policy may be extended or its provisions waived, are not given their intended effect. Such provisions are intended to be effectual unless or until the parties agree otherwise and the company can be bound by an agreement of waiver only where such agreement is made by an agent who is authorized to make it."

POINT III

There is no evidence of any authority, express, apparent or implied on the part of either Flanigan, Mermey or Hemingway to orally bind the World's Fair by contract.

There is no evidence of any act of World's Fair, or of anything being done with its knowledge or the knowledge of its officers, which could have suggested that Hemingway, Flanigan or Mermey had authority to make an oral contract when the Proposal specifically provided that the only way it properly could be accepted was in writing by a duly authorized agent. As the Court, per VAN KIRK, *P. J.*, said in *Bussing* v. *Lowell Film Productions*, 233 App. Div. 493 (Third Dept. 1931), aff'd 259 N. Y. 593, at page 495:

> "No act of the defendant, and nothing done with its knowledge or the knowledge of any of its officers, had come to the attention of the plaintiff which could have suggested that Russell had authority to make the contract on which the action is brought, or to rent an office in New York for the defendant. 'The principal is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. (*Edwards* v. *Dooley*, 120 N. Y. 540, 551.)' (*Conant* v. *American Rubber Tire Co., supra*, 329.) The fact of agency or the extent of his powers may not be established by the representations of the agent. *Wakefield Rattan Co.* v. *Tappen*, 80 Hun, 219.)"

In the case at bar, plaintiff had notice that the acceptance of a Proposal would be by a notice in writing, signed by a duly authorized representative of the Fair and that no other act of the corporation could constitute the acceptance of a Proposal (524). Not only did plaintiff have such

notice but since such notice was specifically incorporated in plaintiff's Proposal, plaintiff in legal effect acquiesced in and agreed to it. Yet the plaintiff insists that it has a right to show what a lawyer for the Fair is alleged to have said, what a director of concessions and exhibits is alleged to have said, what the administrative assistant to the president is alleged to have said, *without laying any foundation* other than showing that the lawyer had performed legal services for the Fair (337), that the administrative assistant to the President had that title and was a member of the Concessions Pre-Qualification Board (366) and that the director of concessions and exhibits was also a member of the Concessions Pre-Qualification Board and was engaged in getting people interested in concessions and exhibits (344)! Knowing that the stipulation between the Fair and the bidder was that the acceptance must be in writing by a duly authorized representative and knowing that the specimen contract in the Booklet of Concessions indicated clearly *that only Mr. Whalen, the President of the Fair,* was the authorized representative (640), nevertheless the plaintiff made no effort to find out if, by any chance, any of the three abovementioned men had been designated as a duly authorized representative to sign or to act for the Fair. Moreover, there is no evidence in the record of any course of conduct, or of any express, apparent or implied authority (374, 383), which would indicate that these men or any of them had authority to enter into such contract as is alleged by the plaintiff. Nor is there any evidence in the record of any other contract signed by any of these men or of any contract made orally by any of these men or by anybody else connected with the Fair. Nor is there any evidence of any holding out by the Fair that any of these men had power to bind the Fair in any way or vary the terms of the written Proposal. Instead, out of a clear blue sky, plaintiff seeks to bind the Fair to an alleged oral contract which would be in complete derogation of the

notice that had been given and accepted and the stipulation that had become a part of the Proposal, without introducing a scintilla of evidence as to the express, apparent or implied authority of any of these men to bind the Fair or vary the written notice and stipulation that provided that acceptance could only be in writing by a duly authorized representative of the Fair.

The testimony of Grover Whalen on examination before trial, that it was in the line of Mr. Hemingway's work for Mr. Hemingway to draw concession documents after bids were received and accepted, is not a holding out of Mr. Hemingway by the Fair to third parties as a person duly qualified to vary the terms of the written proposals, or to make oral contracts. It is not a statement of either actual or implied authority for Mr. Hemingway to deal with third parties. It is not a statement that this alleged oral contract had already been made by the Fair. (Hemingway is alleged to have had the written contract form prepared *before* the alleged oral acceptance by Flanigan and Mermey.) It at most might be considered a statement of the routine in which Hemingway usually worked, and has no bearing on the question as to whether or not there was implied authority in any of these men so far as third persons were concerned to vary the specific stipulation between the Fair and the bidder that any contract would exist until an acceptance in writing signed by a duly authorized representative of the Fair had been submitted.

Every authority cited by plaintiff in its brief, both from the quoted portions as well as from a complete reading of the opinions themselves, either entirely supports the position of respondents or has absolutely no bearing upon the issues here involved. That such is the fact with respect to the quotations from authorities in plaintiff's brief is obvious from a reading of said quotations in plaintiff's brief and seems to require no further comment. As an illustration, we point to the quotation from *Martin* v. *Webb*, 110 U. S. 7, found on page 40 of plaintiff's brief.

POINT IV

The burden of proving authority was on the plaintiff.

As has been pointed out above, the plaintiff did not introduce even a scintilla of evidence of any authority express, apparent or implied, on the part of Mr. Hemingway, Commander Flanigan or Mr. Mermey to bind the Fair as to the contract herein alleged or as to any other similar contract. Petitioner argues that there was evidence admitted sufficient to satisfy the requirement of a preliminary showing of authority. This statement is untrue. As the record clearly shows, no evidence was introduced as to the authority of any of the aforementioned three men to bind the Fair by written or oral contract. As to the burden of proof, the authorities are clear. The rule is that a party who seeks to charge a principal for a contract allegedly made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. For example, in *Schutz* v. *Jordan*, 141 U. S. 213 (1890), the Court, per Mr. Justice BREWER, stated at page 218:

> "A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred."

In *Adams* v. *Barron G. Collier, Inc.*, 73 F. (2d) 975 C. C. A. 8th (1934), the Court per BELL, *D. J.*, said at page 978:

"The appellant, having asserted agency, had the burden of proving it. *Schutz* v. *Jordan,* 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705; *Texas Company* v. *Quelquejeu* (C. C. A.) 263 F. 491; *Knox College* v. *Gray* (C. C. A.) 299 F. 179."

In *Ferro Concrete Const. Co.* v. *United States,* 112 F. (2d) 488, C. C. A. 1st (1940), the Court per PETERS, *D. J.,* said at pages 490-491:

"In considering evidence as to the authority of Starr to make the alleged new contract with Luchini the rule as to the burden of proof is important. It was thus stated in the case of *Owens Bottle-Machine Co.* v. *Kanawha, B. & T. Co.,* 4 Cir. 259 F. 838, 842:

'It is of course an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when suit is brought against the principal in respect of an act of such agent, the burden is upon the plaintiff to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority.'

'A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it.' *Schutz* v. *Jordan,* 141 U. S. 213, 11 S. Ct. 906, 907, 35 L. Ed. 705."

And in Mechem on the Law of Agency (1914), Section 255, it is stated:

"§ 255. AUTHORITY MUST BE PROVED—BURDEN OF PROOF—In the first place it is to be recalled that, except in the few cases already referred to wherein the law confers authority, the law itself makes no presumption of agency: it is always a fact to be proved; and the person who alleges it has the burden of proving it by a preponderance of the evidence."

POINT V

The dismissal of the complaint as against defendant Swift & Company was proper.

Obviously, before plaintiff could succeed in the second cause of action of the complaint, alleging that Swift & Company had induced a breach of the contract, the making of the contract had to be proved, as petitioner admits. There being no evidence of any contract, the motion of Swift & Company to dismiss the complaint as against Swift & Company on the merits (457) was properly granted by the trial Court, and affirmed by the Circuit Court of Appeals. On petition for rehearing to the Circuit Court of Appeals, the question as to whether or not such dismissal should have been without prejudice was vigorously argued for the first time by petitioner in a nine-page petition, and petition for rehearing was denied by the Circuit Court of Appeals. Obviously a dismissal of the complaint on the merits was proper because the trial on the alleged cause of action against New York World's Fair for breaching a contract and against Swift & Company for allegedly inducing a breach of an alleged contract was a trial on the merits, and the plaintiff failed. There is absolutely no merit to the contention that the dismissal should have been "without prejudice."

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

LOWELL WADMOND,
Counsel for Respondent Swift & Company.

EDWARD D. ROBBINS,
Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX

Opinion of the Circuit Court of Appeals [124 Fed. (2d) 82]

Before SWAN, CHASE, and FRANK, Circuit Judges.

CHASE, Circuit Judge.

This suit, originally brought in the Supreme Court of the State of New York, was removed to the Southern District of New York and there tried to a jury. At the close of the plaintiff's evidence, the court granted a motion to dismiss the complaint as to each defendant for failure to prove a prima facie case and the plaintiff has appealed. The cause of action alleged against the defendant New York World's Fair 1939 Incorporated, which will be called the Fair, was the breach of a contract the plaintiff claimed to have made with it for a concession at the Fair and that against Swift & Company was for inducing the breach of the contract.

The plaintiff was one of five who, having with a dozen others satisfied the preliminary requirements of the Fair, submitted bids on what is called a concession for the sale of hamburgers, frankfurters, coffee, tea and milk at the New York World's Fair. It is undisputed that it was the highest bid made and also undisputed that the Fair had reserved the right to reject any and all bids if it so pleased as well as the right to award the concession to one other than the highest bidder. And it is also undisputed that the plaintiff's bid was never accepted in writing as required, before the Fair should be bound, by the specifications on which the plaintiff acted in submitting its bid.

The trial court put no reliance upon any failure to carry out the formal provisions of the specifications as to the manner of, or restrictions upon, contracting; realizing that they were subject to waiver, and let decision turn on the broad, decisive ground that the plaintiff failed to show

that anyone having authority to accept its bid ever did so in behalf of the Fair before all bids were, of right, rejected.

The record shows, inter alia, that after the five bids were received they were opened and read publicly at the office of the Fair in the Empire State Building in New York City on Feb. 1, 1938. This was done by the Secretary of the Fair in the presence of representatives of the plaintiff and others and of the following who represented the Fair: Mr. Hemingway, an attorney and member of the firm of Lord, Day & Lord, counsel for the Fair; Mr. Mermey, the Acting Director of Concessions and Exhibits; and Commander Flanigan, then the Administrative Assistant to the President.

The parties are not entirely in accord as to what was said and done respecting the plaintiff's bid after all the bids were read but it is undisputed that no one on behalf of the Fair accepted the plaintiff's bid before all bids were rejected unless one or more of the three men named above did so. And as we agree with the trial judge that neither individually nor collectively were they shown to have had authority to accept the bid, whatever conflict there may be as to what was in fact said or done is not of great importance.

It is certain that the plaintiff's bid was treated as the highest and Mr. Hemingway prepared a contract for the concession in accordance with the terms of the bid. He tried to telephone a Mr. Trulis who was stated in the preliminary information furnished the Fair to be plaintiff's president but, being unable to find a trace of him, called instead a Mr. Golde who was not in but in response called Mr. Hemingway on the morning of Feb. 2, 1938 and the two men arranged to meet and did meet with others that afternoon at the office of the Fair where the bids had been opened the previous day. The plaintiff's claim is that this meeting was for execution of the formal contract

which had been drawn by Mr. Hemingway; while that of the Fair is that it was for further discussion as to the terms of the plaintiff's bid.

For the purpose of determining whether or not there is any substance to this appeal we may assume, without more, that the three men who were acting for the Fair understood that the plaintiff's bid was the highest; believed that it would be accepted; and in so far as they were authorized so to do did all they could to bring about its acceptance. Being a bid which contemplated the execution of what was in part a lease of space on the grounds of the Fair for a term of not more than a year which was to begin in the future, acceptance did not as a matter of law have to be in writing. New York Real Property Law, §§ 242, 259; Ward *v.* Hasbrouck, 169 N. Y. 407, 419, 62 N. E. 434. Nor is the express provision that acceptance, to be binding upon the Fair, must be in accord with stated requirements to be treated as immutable. Authorized representatives of the Fair could waive such provisions and if they did so the restrictions would disappear as a condition upon the making of a contract. Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 76, 29 L. R. A. 431, 43 Am. St. Rep. 757; Lehigh Structural Steel Co. *v.* Great Lakes Const. Co., 2 Cir., 72 F. 2d 229.

But where a bidder had been previously informed, as this plaintiff had been that the only binding acceptance of a bid would be a notice in writing signed by a duly authorized representative of the Fair it was bound to know that any other mode of acceptance would be a departure from that prescribed and ostensibly unauthorized. The plaintiff was, accordingly, also bound to take suitable steps to ascertain the actual authority of those with whom it undertook to deal in a manner other than that which it had been informed was essential to the making of a valid contract. The unperformed duty of inquiry

may, and often does, make it impossible to rely upon any so-called apparent authority of an agent. Ernst Iron Works *v.* Duralith Corp., 270 N. Y. 165, 200 N. E. 683; Marvin *v.* Universal Life Insurance Co., 85 N. Y. 278, 39 Am. Rep. 657; Cullinan *v.* Bowker, 180 N. Y. 93, 72 N. E. 911; Drennan *v.* Sun Indemnity Co., 271 N. Y. 182, 2 N. E. 2d 534.

Moreover, here there was nothing to induce any belief on the part of the plaintiff's representatives that any of the men with whom they talked at the offices of the Fair in the Empire State Building intended to vary in any way the stated requirements for the binding acceptance of a bid by the Fair. The contract which had been prepared showed on its face that it was to be executed by the Fair, if at all, by someone other than any of them. While it seems to have been taken for granted that execution of the contract would follow in due course, that was because the giving of needed approval was assumed rather than any thought that no additional approval was necessary. Since the plaintiff based its cause of action upon an oral acceptance of its bid before the formal rejection of all the bids, it was necessary for it to show that the men with whom it dealt had authority to accept its bid as it claims they did. Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705; Ferro Const. Co. *v.* United States, 1 Cir., 112 F. 2d 488. The evidence offered and received clearly fell short of providing the required proof and unless there was error in the exclusion of evidence the plaintiff sought to introduce the judgment must be affirmed.

The trial judge held the plaintiff strictly to its *prima facie* proof of the authority of Messrs. Hemingway, Mermey and Flanigan to act in behalf of the Fair in accepting its bid as a condition precedent to the introduction of evidence as to what they actually said and did.

Often it is better to admit evidence tentatively upon assurance that its competency will appear and the discretionary power of the judge is ample for that. Stecher Lithographic Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213. The judge, however, repeatedly assured the plaintiff's attorney that any evidence of agency he offered would be received and was well within the realm of sound discretion in being insistent that some of such proof precede the introduction of any so-called admissions of the alleged agents. At most they were special agents who could not bind their principal by declarations, or what are sometimes called admissions, as to the scope of their authority. That had to be proved otherwise than by their own representations. Dudley *v.* Perkins, 235 N. Y. 448, 139 N. E. 570; Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827; Wakefield Rattan Co. *v.* Tappan, 80 Hun 219, 30 N. Y. S. 38. Furthermore, there is no reasonable cause for believing that the plaintiff could have shown any such declarations or admissions if answers to the excluded questions had been taken.

There was one excluded part of the pre-trial examination of Mr. Whalen, president of the Fair, which is said to have been admissible. It was not, indeed, the declaration of an alleged agent and had it been less vague and inconsequential its exclusion might not have been harmless. He was asked when he first learned that Mr. Hemingway had prepared the draft of the contract for the concession following the plaintiff's bid and replied: "I don't know as I had any definite knowledge that this specific concession agreement was drawn except that it was in the line of Mr. Hemingway's responsibility to draw these immediately after bids were received and accepted by the corporation." Besides indicating an absence of knowledge as to what had been done in respect to the contract about which he was asked, the witness merely

volunteered his understanding of when Mr. Hemingway would draw a contract in performing his work as counsel to the Fair. When Hemingway generally drew such contracts was obviously irrelevant to the question of his, or Mermey's or Flanigan's actual authority to accept plaintiff's bid. At most the excluded evidence might have given some rather dubious support to an inference that Hemingway prepared the contract because he understood that the plaintiff's bid had been accepted. Even so, the evidence still but tended to show an irrevelant fact. What Hemingway may have understood, and we do not intimate that he did understand that plaintiff's bid had been accepted, was immaterial certainly until he was first by competent evidence shown to have had authority to bind the Fair in some way in respect to that bid.

No contract with the Fair having been proved, the plaintiff failed to prove any cause of action alleged against either defendant.

Affirmed.

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157-8

FILED
MAY 8 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1143

FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED and SWIFT AND COMPANY,
Respondents.

BRIEF OF RESPONDENT NEW YORK WORLD'S FAIR 1939 INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE DEFOREST LORD,
Counsel for Respondent, New York World's Fair 1939 Incorporated.

THOMAS F. DALY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1143

FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED and SWIFT AND COMPANY,
Respondents.

BRIEF OF RESPONDENT NEW YORK WORLD'S FAIR 1939 INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The Circuit Court of Appeals for the Second Circuit decided the particular issues herein in question unanimously in favor of this respondent, delivering an opinion which is reported in 124 Fed. (2d) 82.

No reported opinion was rendered by the United States District Court for the Southern District of New York.

II.

Jurisdiction.

Neither the petition nor the record raises a single substantial Federal question (Rule 12, par. 1 and Rule 28, par. 5, subds. a and b), and the petition should now be dismissed on the merits.

The sole question presented to this court is whether or not the plaintiff had proved implied or apparent authority, on the part of two employees of and an attorney for the Fair, to waive the requirements of plaintiff's bid that all concession contracts must be in writing, executed by a duly authorized officer of the Fair, and had proved that these two employees and a lawyer for the Fair had implied or apparent authority to enter into an oral contract for the operation of the hamburger and frankfurter concession. The District Court ruled that there was no evidence of implied, apparent or actual authority on the part of these three persons to waive the requirements that the contract be in writing, executed by a duly authorized officer of the Fair or to enter into an oral agreement. This ruling on the facts was affirmed by the Circuit Court of Appeals.

III.

The Action Below.

The action below was commenced in the Supreme Court, New York County, by Franham Distributors, Inc. (hereinafter called "petitioner" or "plaintiff") and was removed to the United States District Court for the Southern District of New York upon a complaint setting forth two separate and distinct actions: The first was to recover $1,000,000 as damages from the New York World's Fair 1939 Incorporated (hereinafter called the "Fair") for breach of an alleged oral contract to award to plaintiff the hamburger and frankfurter concession at the Fair during the 1939 season; and the second was to recover $1,000,000 from Swift and Company for allegedly tortiously inducing the Fair to breach such contract. The Fair denied that any contract had been made. Swift and Company denied that it had induced a breach of the alleged contract. There is no charge of conspiracy between the Fair and Swift and Company.

The action was tried to a jury. At the close of the plaintiff's evidence, the Court granted a motion to dismiss

the complaint as to the Fair and Swift and Company for plaintiff's failure to prove a *prima facie* case. Judgment was entered in the lower court on October 31, 1940, in favor of the defendants Fair and Swift and Company, which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit, the judgment of that court being entered on February 6, 1942. Application by petitioner for a re-hearing was denied by the Circuit Court of Appeals on January 8, 1942.

IV.

Corrected Statement of the Case.

The petitioner has referred at great length to the alleged facts in the case, the "facts" mostly being assertions made by plaintiff's counsel in his opening to the jury. Because of the impression that may be left by such references, we deem it necessary to set forth the facts as they actually were.

As stated by the Court in *Kennedy & Co.* vs. *New York World's Fair 1939 Incorporated* (2nd Dept., 1940), 260 App. Div. 386 at 389, affirmed without opinion, N. Y., , the Fair "* * * is of such a nature that it is a 'public purpose.' The Fair has the sponsorship, in different degrees, of the city, State and Federal governments. It includes exhibits of art, science, business, states and nations, and educational and recreational facilities. The defendant Fair Corporation is a non-profit membership corporation; and the enabling legislation (Laws of 1936, chap. 544) and a subsequent enactment (Laws of 1939, chap. 471) provide that after payment of expenses, any surplus resulting is to be turned over to the city and the State for public purposes."

The Fair being a huge public enterprise dedicated to a "public purpose," the operation of which entailed the employment of thousands of persons and the making of numerous contracts, concession and exhibit agreements involving millions of dollars, it was necessary, in order to

avoid any suggestion of corruption, favoritism or mistake, that a system should be adopted which would make certain that, before the Fair obligated itself under a contract, the proposed contract would first have been considered and approved by the proper authorities.

Accordingly, the Board of Directors of the Fair Corporation established an orderly procedure for the acceptance of contracts for concession agreements. One of the requirements was that before any concession agreement could be entered into, it first must be approved by the Executive Committee (fols. 262-263).

As a great number of people were seeking concessions to operate various ventures which were to be located at the Fair, a method was also devised to enable the Fair to eliminate as prospective applicants for a concession such persons as, from a preliminary investigation, obviously appeared to be unqualified to operate the same (fols. 243-244).

In order to obtain information upon which to make such a preliminary determination, the Fair gave to each applicant a so-called "Information Return from Applicants for Concessions" hereinafter called "Information Return" (Pltf.'s Ex. 2, pp. 156-160, incl.), which the recipient thereafter filled out as indicated and returned to the Fair. Thereafter an investigation was made to ascertain in a preliminary way the truth of the assertions made therein. The "Information Returns" together with the report of the preliminary investigation were then sent to a group at the Fair known as the "Concessions Pre-Qualifications Board" for their consideration. If after consideration the Board found an applicant pre-qualified to bid for a concession and its findings were approved by Grover Whalen, President of the Fair (Pltf.'s Ex. 3, p. 161), the applicant for the purpose of making its bid was sent a booklet (hereinafter called "Proposal to Bid") which previously had been prepared by the Fair (Pltf.'s Ex. 5, pp. 168-215). This procedure was followed only where the Fair previously had determined that it would call for public bids on a particular concession. The Fair

was under no compulsion to call for bids and could privately award a concession if it so desired.

After the applicants had made up their bids, the Proposals to Bid were returned to the Fair Corporation as sealed bids and thereafter at a time stated therein, they were publicly opened and read (Pltf.'s Ex. 5, fols. 511-512, 519), the bidders were interviewed, and a report made to the Executive Committee. Subsequently, if the Executive Committee decided to accept any of the bids, a notice in writing signed by a duly authorized representative of the Fair, as provided by the "Proposal to Bid," would be sent to the successful bidder. Thereafter the rights and obligations provided for in the Concession Agreement were to become effective and binding on the parties upon its formal execution by the Fair (Pltf.'s Ex. 5, Par. No. 7; fol. 525). The Fair reserved the right to reject any and all bids for any reason whatsoever (Pltf.'s Ex. 5, fols. 513, 519, 522, 545-546, 556). Accordingly, it was not bound to let the bid to the highest bidder.

In the latter part of 1936, the Fair had determined that one of the projects at the Fair grounds for which bids were to be asked would be a concession for 70 stands for the sale of hamburgers, frankfurters, coffee, tea and milk, to be operated as one concession, and a large number of persons thereafter applied for the concession (fol. 241; Pltf.'s Ex. 3, pp. 161-166).

In line with the Fair's policy, each person, including plaintiff, who made inquiries with reference to the hamburger and frankfurter concession, was given an "Information Return" (fols. 243-245; Pltf.'s Ex. 2, pp. 156-160). This "Information Return" in no way committed the Fair, it being expressly stated thereon that "The Information herein furnished to New York World's Fair 1939 Incorporated is solely for its use in the classification and consideration of Applicants for Concessions and shall in no way be binding upon the Fair Corporation" (Pltf.'s Ex. 2, p. 156).

As will appear from Plaintiff's Exhibit 3 (pp. 161-166), one hundred and three persons, including plaintiff, filed

"Information Returns" with the Fair for the hamburger and frankfurter concession, of which number eighty-six for various reasons were not recommended to be pre-qualified to bid (Pltf.'s Ex. 3, pp. 164-166). The balance or seventeen were regarded as pre-qualified (Pltf.'s Ex. 3, pp. 161-163) and "Proposals to Bid" which had previously been prepared by the Fair were sent to them. Among these was the plaintiff.

Of these seventeen, only five submitted bids. These included the plaintiff [whose sealed bid contained in its "Proposal to Bid" (Pltf.'s Ex. 5; fols. 546-563) was filed with the Fair on the morning of February 1, 1938 (fols. 197-198, 248)] and York Food Company, a subsidiary of defendant Swift and Company. With the exception of plaintiff, all of the other five bidders were experienced restaurant people, Swift and Company, although a food packing company, having operated the hamburger and frankfurter concession at the Chicago World's Fair (fols. 230, 249, 276; Pltf.'s Ex. 8, p. 220).

As stated above, the bids were sealed, and pursuant to their terms, were to be publicly opened and read at the office of the Fair in the Empire State Building on February 1, 1938 at 12 noon (Pltf.'s Ex. 5 at fol. 511).

At noon on that day, Mr. James S. Hemingway, attorney and member of the firm of Lord, Day & Lord, counsel for the Fair, Mr. Maurice Mermey, the Fair's Acting Director of Concessions and Exhibits, and Commander Howard A. Flanigan, who was then Administrative Assistant to the President, being present, the bids were opened and read by the Secretary of the Fair to those who were present, including plaintiff's representatives (fols. 198, 247, 248, 330-331). After the opening and reading of the bids, it was obvious that the plaintiff was the highest bidder. In fact, an examination of Plaintiff's Exhibit 8 (p. 220) shows that, both in percentages and in the amount of bonds which plaintiff agreed to take, plaintiff's bid was considerably higher than that of the next highest bidder.

On the same day, *i. e.*, February 1, shortly after the bids were opened and read, and when it was apparent that

the plaintiff was the highest bidder, Commander Flanigan instructed Mr. Hemingway to get the plaintiff's representatives in for the purpose of discussing its bid. Up to this time, no one connected with the Fair had ever met anyone connected with the plaintiff (fol. 331). Accordingly, a meeting was desired in order that the Fair might inquire further into plaintiff's qualifications and ascertain whether or not it was capable of operating this important concession (fol. 252). Mr. Hemingway attempted to get in touch with Mr. Trulis, listed on the Information Return as the President of the plaintiff corporation. He was unable to locate Trulis at the address given on the Information Return and was told, in fact, when he telephoned to the house, that no such person was known there. He reported this to Commander Flanigan and was then instructed to get in touch with Mr. Louis Golde who was listed on the Information Return as the Treasurer of the plaintiff corporation. Mr. Hemingway called Mr. Golde at his office but Golde was not in. He left word for Golde to call him (fols. 249-252). Mr. Hemingway did not call or speak to Max Natanson on February 1, as claimed by plaintiff, nor did he speak to Mr. Golde on that day, nor did he have any conversation with anyone connected with the plaintiff corporation on that day (fols. 252-253). On the morning of February 2, Golde returned Hemingway's call, at which time the only conversation had was to the effect that the Fair wished to see the plaintiff's representatives for the purpose of discussing the bid. An appointment was then made for 3 o'clock that afternoon at the offices of the Fair in the Empire State Building. At the appointed time, Mr. Louis Golde appeared at the offices of the Fair, accompanied by Max Natanson and a Mr. Julius Zeiser, an attorney (fols. 253-255). When Golde, Natanson and Zeiser arrived, there were already present Hemingway, Mermey and Commander Flanigan (fols. 255-256). At no time did Hemingway, Mermey or Flanigan congratulate the plaintiff's representatives on the plaintiff being the highest bidder; nor did they tell them that plaintiff's bid had been accepted or that the contract was theirs, or in

any other way indicate that plaintiff's bid had been accepted (fols. 256-261). All of these men were well aware of the fact that before any concession could be awarded the Fair's Executive Committee would first have to approve it (fols. 262-263). After introductions were made (none of the parties ever having met before; fols. 250, 256, 331, 333), the conversation was opened by Mr. Golde who stated that Franham wanted a reduction in the amount of the Fair bonds it had obligated itself to purchase. He stated that although they had agreed to purchase $600,000 of the bonds, the next highest bidder had agreed to purchase only $150,000 of the same, and that when the persons plaintiff had interested in purchasing the $600,000 of bonds saw that the other bids which had been made by experienced restaurant people were so much lower, they refused to go through with the purchase of the bonds. Commander Flanigan replied that he did not believe that the Executive Committee would consent to a reduction in the amount of the bonds as the Fair was trying to sell as many bonds as possible, but that he would take it up with them (fols. 256-257).

Commander Flanigan then inquired of Mr. Golde who Tom D. Trulis was. Flanigan asked the question because, while plaintiff's Information Return indicated that Trulis, who signed it as its President, was the one person connected with the plaintiff organization who had the necessary experience in the operation of similar concessions, reports had come to the Fair which led it to believe that the information concerning Trulis's experience was false. The Fair, previous to February 2, had been informed that Trulis's only experience had been in the operation of restaurants at race tracks for the employees of those tracks, *i. e.*, jockeys, swipes, etc., and that he had never operated restaurants or concessions for the general public (fol. 257). Mr. Golde replied that they were not tied up with Trulis in any way; that he was no longer President of or interested in the corporation; that he was out of the picture and that he had been named as President in the Information Return for the reason that he was the only one they knew who had had any experience in the restaurant busi-

ness (fols. 257-258). The plaintiff's bid as distinguished from the Information Return was signed by Louis Golde as President, and not by Trulis who at the time of the filing of the bid was no longer President of the Company (fol. 202) (Pltf.'s Ex. 5, at p. 187). Commander Flanigan then asked Mr. Golde whether or not they had made any commitments for the purchase of their hamburgers and frankfurters, and upon Mr. Golde's answering in the negative, Flanigan stated that Swift and Company was to be an exhibitor at the Fair, that it was the policy of the Fair to assist its exhibitors if possible and that if plaintiff had made no commitments to any other food purveyors, he would like its representatives to speak to a representative of Swift and Company to see if an arrangement could be worked out whereby Swift and Company would supply the hamburgers and frankfurters if plaintiff obtained the concession. Mr. Golde stated that he would be pleased to do so and thereafter an appointment was made for Mr. Golde to see Mr. Morris, a representative of Swift and Company, the following day. With that the conference broke up and the plaintiff's representatives left (fols. 258-261).

Previous to the conference, Mr. Hemingway had prepared a draft of the proposed contract for the purpose of going over the terms of the same with plaintiff's representatives. As the plaintiff's representatives were leaving, Mr. Zeiser, who was the attorney for plaintiff, asked Mr. Hemingway to let him have the proposed contract as he wanted to study it (fol. 263). (It is to be remembered that the proposed concession contract if executed by the Fair committed the plaintiff to an immediate expenditure of over three-quarters of a million dollars, while the Fair was not to open until some time in May 1939.) Mr. Hemingway complied with the request. The plaintiff's representatives then left and Commander Flanigan met Mr. Morris of Swift and Company and told him what had transpired and asked him to see the plaintiff's people, to which Mr. Morris reluctantly agreed, stating that Swift and Company was interested in the concession itself and it did not want to go in with anyone else (fols. 264-265). Thereafter,

on the same day, Commander Flanigan, in the presence of Mr. Hemingway and Mr. Mermey, prepared a report of their conferences with the plaintiff's representatives and with Morris and sent it to Mr. Grover Whalen, the President of the Fair (fols. 265-266). Whalen in turn took it up at a meeting of the Executive Committee of the Fair held that evening at 5 o'clock (fol. 266). This meeting was not an extraordinary or unusual one, as intimated by plaintiff's counsel. It was held for the reason that on that day, and immediately preceding it, the Board of Directors of the Fair Corporation had held its annual meeting, at which meeting the Executive Committee for the succeeding year had been appointed (fol. 266).

The Executive Committee, having before it Flanigan's report made about an hour previously, rejected all bids, including the plaintiff's bid (fol. 270).

The hamburger and frankfurter concession was a very important one (fol. 180) and the character and background of the persons or corporations securing it were of the utmost concern to the Fair for two reasons: (1) It was realized that the sale of hamburgers and frankfurters, unless they were of the very best quality, carried with it grave danger of food poisoning to the patrons of the Fair, with the resulting injury to the patrons and damage to the reputation of the Fair; and (2) the Fair expected to derive large profit from this concession. For both of these reasons, the Executive Committee wished to be sure that it was dealing with responsible and experienced people upon whom it could rely. On the basis of Flanigan's report, the Executive Committee felt that plaintiff would not be a proper party to operate the concession (fols. 241, 266-268).

As the other bids had been low with respect to the amount of bonds to be purchased (see Pltf.'s Ex. 8, fols. 658-660), the Executive Committee decided to take new bids in which the percentages would be fixed at the minimum set forth in the original Proposal to Bid (Pltf.'s Ex. 5, at fols. 542, 543), thus only permitting competitive bidding on the amount of Fair debentures to be purchased (fol. 270).

On the next day, February 3, a telegram was sent to plaintiff and the other bidders informing them that all bids had been rejected (fol. 216).

Subsequently, Childs and Company was awarded the concession after obligating itself to purchase $600,000 of the Fair's debentures (fol. 270).

The damage claimed by plaintiff for the Fair's breach of its alleged oral contract is the loss of $1,000,000 in profits which it asserts it would have earned if it had been allowed to operate the concession during the 1939 season of the Fair (fols. 20, 237).

ARGUMENT

POINT I

The trial judge properly excluded the testimony of plaintiff's witnesses respecting alleged conversations with Messrs. Hemingway, Mermey and Flanigan.

The trial court refused to permit the plaintiff's witnesses to testify to conversations had with Mermey, Hemingway and Flanigan for the reason that no evidence had been offered showing that these three gentlemen were expressly or impliedly authorized to bind the Fair (Opinion of the trial court at fol. 460).

It is, of course, an elementary principle of law that declarations of an alleged agent are not competent evidence unless it is first proved that he was the agent of the party sought to be bound and that the declarations or admissions were made in respect to matters within the scope of his agency.

First Unitarian Soc. of Chic. vs. *Faulkner* (1875), 91 U. S. 415;

Stringham vs. *St. Nicholas Ins. Co.* (1867), 42 N. Y. (3 Keyes) 280;

Edwards vs. *Dooley* (1890), 120 N. Y. 540;

Bell vs. *Harrison* (1876), 66 N. Y. 627;

Marvin vs. *Wilbur* (1873), 52 N. Y. 270.

And whether or not there is any competent evidence reasonably tending to prove the existence of an agency is for the Court to determine and if there is none or if it is so slight that a finding thereon would not be sustained, the question should be disposed of by the Court and not submitted to the jury.

Hedeman vs. *Fairbanks-Morse Co.* (1941), 286 N. Y. 240 at 248;

Franklin Bank Note Co. vs. *Mackey* (1895), 83 Hun 511; aff'd 155 N. Y. 685. Motion for reargument granted 157 N. Y. 674, reversed on other grounds 158 N. Y. 140;

Hunter vs. *Royal Ins. Co.* (1924), 209 App. Div. 15;

Mechem on Agency (2d Ed.), Secs. 293, 295.

Petitioner concedes in its brief (bottom p. 31) that these three men had no express authority to orally or otherwise accept plaintiff's bid or to enter into a contract with it on the Fair's behalf, but it contends that they were held out by the Fair as being apparently authorized to do so. An examination of the record discloses that there is not the slightest evidence to support such a contention.

The testimony offered by plaintiff in its attempt to prove the apparent authority of these three gentlemen consists for the most part of concessions respecting Messrs. Hemingway, Mermey and Flanigan made by the Fair's counsel at the trial.

The facts conceded as to James S. Hemingway were as follows:

In December of 1937 and January and February of 1938, Mr. Hemingway was a member of the law firm of Lord, Day & Lord; that as a member of that firm, he was in the legal department at the Fair, doing the legal work

of the Fair, and that among his duties was the drafting of all the contracts in the Concessions Department and the rendering of other legal services (fols. 337-338). The fact that Mr. Hemingway as attorney for the Fair had prepared a draft of the proposed Concession Agreement prior to the conference of February 2, and Mr. Whalen, on his examination before trial, in response to a question by plaintiff's counsel as to when he first learned that Mr. Hemingway had prepared the proposed Concession Agreement (Pltf.'s Ex. 10 for identification, pp. 222 *et seq.* of the record), answered "*I don't know as I had any definite knowledge that this specific concession agreement was drawn* except that it was in line with Mr. Hemingway's responsibility to draw this immediately after bids were received and accepted by the Corporation" (fol. 425), in no way indicates that Mr. Hemingway had any authority, expressed, apparent or implied, to bind the Fair.

Indeed, at the trial, plaintiff's counsel during a colloquy with the Court, conceded Mr. Hemingway had no authority to bind the Fair when he stated:

> "Mr. Pfeiffer: Now I don't submit that at this time, and perhaps you haven't got my trend of thought. *We are not contending that this telephone call from Hemingway or this conversation between Hemingway and Golde made the contract,* • • •." (fol. 339) (Italics ours unless otherwise noted)

The facts conceded as to Maurice Mermey were as follows:

He was a member of the Pre-Qualifications Board, was Acting Director of Exhibits and Concessions from December 31, 1937 to May 1938, and among his duties was the planning and developing of the various types of concessions to be had, and to sell all the exhibit space to be sold, that is, all of the domestic exhibit space, exclusive of government contracts (fols. 342-343).

It was never conceded or proved that he had the power to negotiate contracts in the sense that he had authority to accept and execute contracts on the Fair's behalf for

concessions and exhibits as set forth in petitioner's brief (pp. 37-38). Defendant Fair's counsel expressly refused to so concede; whereupon plaintiff's counsel stated that he had Mr. Mermey [who at the time of his examination before trial by plaintiff and at the time of trial was not employed by the Fair (fol. 360)] under subpoena, and asked that the trial go over another day so that he could call Mr. Mermey to testify that he had such power (fols. 342-346, 413). The trial judge granted the adjournment (fols. 433-435), but on the following day Mr. Pfeiffer failed to call Mr. Mermey and stated that he had no further proof as to authority other than the concessions which previously had been read into the record (fols. 437, 447).

The facts conceded as to Commander Howard A. Flanigan were as follows:

He was Administrative Assistant to the President on February 2, 1938 and was not then the Executive Vice-President of the Fair, as stated in the head note of Point I of petitioner's brief, although he subsequently became such, his duties thereafter remaining substantially the same as before (fols. 365-366). His duties with respect to this particular concession were that he had both his general supervisory charge of it, and also, as Chairman of the Concessions Pre-Qualifications Board, he had a *more* (not "most," as stated in petitioner's brief, page 38) intimate and executive direction of it (fol. 368). Flanigan's affidavit used on the Fair's motion for summary judgment (Pltf.'s Ex. 9 for Identification, p. 221), which was excluded by the Court, merely states that he was Administrative Assistant to the President of the Fair, and in that capacity he was responsible for the taking and considering of bids for the concession involved in this action. Nowhere does it state that he had any authority to accept bids or execute contracts on behalf of the Fair Corporation.

None of these men at the time in question was an officer of the Fair and only Mermey and Flanigan were employed by it.

No evidence was offered or could have been offered by plaintiff (fol. 447) that any of plaintiff's representatives

knew, prior to the commencement of this action, in what way Flanigan, Mermey and Hemingway were connected with the Fair or what their duties were, or that they knew what, if any, authority these three men had. There is no evidence that any of these men at any time were authorized to or did waive any written provisions in the Proposal to Bid or that they were authorized to or did accept bids or execute contracts on behalf of the Fair. There is no evidence that they were ever held out by the Fair as having such authority, or that they were permitted without objection to assume such authority, or that there was any custom or conduct on the part of the Fair which would estop it from claiming any lack of authority on the part of any of these men. There is, of course, no evidence that the Fair knew of or acquiesced in any of the alleged acts done by these men or that it ratified the same. On the contrary, it is clear from the record that the Fair rejected all bids, including the bid of plaintiff, within a few hours after the alleged oral acceptance.

Furthermore, plaintiff knew on and long prior to February 2 that acceptance of a bid could be made only by a duly authorized representative of the Fair and in writing. The "Proposal to Bid," which plaintiff's representatives had studied thoroughly (fol. 186), contained the following:

> "7. Acceptance of Proposals and Its Effect. Within thirty (30) days after the opening of the Proposals the Corporation will act upon them. The acceptance of a Proposal will be a *notice in writing signed by a duly authorized* representative of the Corporation, and no other act of the Corporation shall constitute the acceptance of a Proposal. The acceptance of a Proposal shall bind the successful Bidder to execute the Concession Agreement and to be responsible for liquidated damages as provided in Paragraph 8. The rights and obligations provided for in the Concession Agreement shall become effective and binding upon the parties upon its *formal execution* by the Corporation." (Pltf.'s Ex. 5, fols. 525-526.)

The specimen contract annexed to the Proposal to Bid (Pltf.'s Ex. 5, at pp. 213-214) and the draft contract prepared by Hemingway (Pltf.'s Ex. 10 for Identification) also clearly indicate that the Concession Agreement was to be executed on behalf of the Fair by Grover Whalen, its President. Such notice made it obligatory on the plaintiff to ascertain for itself the authority of Messrs. Hemingway, Mermey and Flanigan before it relied on anything said by them.

As stated by the Court in *Ernst Iron Works* vs. *Duralith Corp.* (1936), 270 N. Y. 165, at page 170:

> "* * * There can be no reliance on apparent authority unless the circumstances are such that the plaintiff is entitled to rely upon it. (See *Deyo* v. *Hudson*, 225 N. Y. 602, 612-614.) 'If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation.' (Restatement of the Law of Agency, § 166, Cf. Id. § 167. See Tiffany on Agency (2d. Ed.) § 19; 75 A. L. R. at p. 1047.)"

See also:

Stringham vs. *St. Nicholas Insurance Co., supra;*

Walsh vs. *Hartford Fire Ins. Co.* (1878), 73 N. Y. 5;

Cullinan vs. *Bowker* (1904), 180 N. Y. 93;

Angerosa vs. *White Co.* (4th Dept., 1936), 248 App. Div. 425, aff'd 275 N. Y. 524.

At the time plaintiff made its bid, its representatives knew that the Fair was a huge public venture which involved the making of many hundreds of contracts for concessions. In view of this and the requirements relative to the acceptance of the bid and the execution of the concession contract contained in its Proposal to Bid, plaintiff now cannot claim that its representatives, who were experienced business men (fols. 303-308), believed or had a right to believe that a contract concerning this important

concession would have been accepted by the Fair in such an off-hand manner, or that Hemingway, Mermey and Flanigan would have authority to do so. As stated in *Union Car Advertising Co.* vs. *Collier* (1934), 263 N. Y. 386 at page 390:

> "We cannot imagine a man of Mr. Wineburgh's experience in the advertising business relying upon the representations of a general manager contrary to the express terms of the contract he was about to sign. He must have known that Dana had no power or authority to vary the written contract."

See also:

> Mechem on Agency (2d Ed.), Sec. 726, where it is stated:
>
> "* * * in any case, the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances. Authority is not 'apparent' simply because the party claiming has acted upon his conclusions. It is not 'apparent,' in contemplation of law, simply because it looked so to him. It is not a situation where one may read while he runs. It is only where a person of ordinary prudence, conversant with business usages and the nature of the particular business, acting in good faith, and giving heed not only to opposing inferences but also to all restrictions which are brought to his notice, would reasonably rely, that a case is presented within the operation of the rule. If the inferences against the existence of the authority are just as reasonable as those in favor of it, there can be no reliance within this rule."

To the same effect see:

> *Quinlan* vs. *Providence Washington Ins. Co.* (1892), 133 N. Y. 356.

Moreover, plaintiff suffered no injury by reason of the unauthorized acceptance of its bid (assuming for argu-

ment's sake that it was accepted by these three men) as it did nothing nor did it refrain from doing anything in reliance thereon. The only damage that plaintiff claims is loss of profits it might have made if it had been allowed to operate the concession (fols. 20, 237). But this alleged loss was not due to any reliance by plaintiff's representatives on anything said or done by Hemingway, Mermey or Flanigan, but was the result of the Executive Committee's rejection of all bids. Accordingly, it cannot rely upon the doctrine of apparent authority to charge the Fair with liability for the alleged unauthorized acts of those three men for "Whether apparent authority is based upon the principle of estoppel or not, it 'implies a transaction itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity.'" *Wen Kroy R. Co.* vs. *Public Nat. Bank and T. Co.* (1932), 260 N. Y. 84 at page 92.

See also *Walsh* vs. *Hartford Fire Ins. Co., supra,* where the Court said at page 10:

> "* * * The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who believing and having a right to believe that the agent was acting within and not exceeding his authority, *would sustain loss if the act was not considered that of the principal.* (*Clark* v. *Metropolitan Bank,* 3 Duer, 248; Story on Agency, Sec. 127; *Howard* v. *Braithwaite,* 1 Ves. & B., 209; *Stainer* v. *Tysen,* 3 Hill, 279; *Barnard* v. *Wheeler,* 24 Me., 279.) * * *."

To the same effect, see:

Bickford vs. *Menier* (1887), 107 N. Y. 490;

Perry vs. *New York Life* (Spec. T., N. Y. Co., 1940), 22 N. Y. S. 2d, 696.

For the reasons stated above, we submit that as a matter of law no competent evidence was offered reasonably tending to prove that the Fair was in any way bound by anything said or done by Hemingway, Mermey or Flanigan. Accordingly, the Court properly excluded all conversations with them.

POINT II

The acceptance of plaintiff's bid would not have obligated the Fair to award the concession to it.

Assuming for argument's sake that plaintiff's bid had been accepted by the Fair, such acceptance would not have obligated the Fair to award the plaintiff the concession as the Proposal to Bid (Pltf.'s Ex. 5 at fol. 525) provides:

> "7. **Acceptance of Proposals and its Effect.** • • • The acceptance of the Proposal shall bind the successful Bidder to execute the Concession Agreement and to be responsible for liquidated damages as provided in paragraph 8. The rights and obligations provided for in the Concession Agreement *shall become effective and binding upon the parties upon its formal execution by the Corporation.*"

Clearly, the effect of such a clause is to make the execution of a written contract by the parties a condition precedent to the existence of a contractual relationship, and where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although the terms of the contract have been agreed upon. See *McCormick* vs. *Oklahoma City,* C. C. A. 8th (1913), 203 Fed. 921; appeal dismissed 236 U. S. 657. There the City of Oklahoma advertised for bids and the plaintiff was the lowest bidder. The specifications for the bid, the advertisements therefor, and the contracts for successful bidders provided expressly that a written contract was to be entered into. The City Council of Oklahoma City, which, according to the terms of the invitation to bid and the proposed contracts, had to approve and confirm the bids, accepted in part the bid of the plaintiff. The City thereafter refused to perform and the plaintiff sued for breach of contract. It was held that the plaintiff did not have a cause of action against the City for the reason that it was clearly contemplated by

the parties that the City was not to be bound by an acceptance of the bid but only by the execution of a formal written contract.

It is stated at page 927 of the opinion:

> "* * * We shall therefore assume that where parties have fully agreed upon a contract, but have simply decided to reduce it to writing as evidence, the contract may be enforced, especially where it has been executed in whole or in part by the party seeking its enforcement, with the knowledge and acquiescence of the other party, notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed, there is no completed contract until it is put in writing as agreed."

To the same effect, see:

General Motors Corp. vs. *Abell,* C. C. A. 1st (1923), 292 Fed. 922; cert. den., 264 U. S. 583;

Ambler vs. *Whipple* (1874), 87 U. S. (20 Wall.) 546;

Evans vs. *Marr,* C. C. A. 5th (1924), 298 Fed. 288; cert. den., 265 U. S. 585;

Best & Company vs. *Federal Terra Cotta Co.* (1st Dept., 1928), 224 App. Div. (N. Y.) 618 at page 619.

Commercial Telegram Co. vs. *Smith,* 1st Dept. (1888), 47 Hun 494.

Furthermore, no claim is made and none could be made by petitioner that the Fair's representatives by word or act waived the provision contained in the bid that after acceptance of the bid the contract was only to "*become effective and binding upon the parties upon its formal execution by the Corporation.*" Indeed, from plaintiff's opening to the jury, it appears that plaintiff's representatives were well aware that the contract was not to be in force until it was reduced to writing and formally executed by the parties as

plaintiff's counsel stated (fol. 215) that plaintiff's representatives at the conference of February 2 asked Commander Flanigan when they should return to sign the contract and were told by him to return the next day.

POINT III

Answering Point I of Petitioner's Brief and Sub-Headings A to D, inclusive, thereof.

We wish to point out again that on February 1 and 2, 1938, Flanigan was not, as repeatedly stated throughout petitioner's brief, the Executive Vice-President of the Fair. At that time he was the Administrative Assistant to the President. Nor is there any evidence that Flanigan and Mermey were, as asserted by plaintiff, at that time officers of the Fair; they were merely employees. Hemingway, of course, was not an officer or employee of the Fair at any time.

For the reasons stated in Point I of our brief, the authorities cited by petitioner in its brief at page 25 and the first half of page 26 have no application to this case.

Answering Sub-Heading A of Point I of Petitioner's Brief:

The assertion made by petitioner that the alleged conversations [which conversations, as admitted by plaintiff's counsel at the trial (fol. 452), were the only proof he had to offer on the making of the alleged contract] had by plaintiff's representatives with Hemingway, Mermey and Flanigan are admissible as part of the *res gestae* without proof as to these three men's authority to bind the Fair is not a correct statement of the law of agency and is not sustained by the authorities cited by the petitioner. On the contrary, *Stecher Lithographing Co.* vs. *Inman* (1903), 175 N. Y. 124 cited at page 26 of petitioner's brief, holds that the acts and declarations of an alleged agent become part of the *res gestae* only when it is first shown that such alleged agent was a duly authorized agent of the person sought to be charged thereby and that they were

uttered by the agent while he was acting within the scope of his authority. That Dean Wigmore is in accord with this view of the law is evidenced from the very first sentence in the quotation from his work set forth at page 26 of petitioner's brief. It reads as follows:

> "It may be noted that *the fact of agency must of course be somehow evidenced before the alleged agent's declarations can be received as admissions;* and therefore the use of the alleged agent's hearsay assertions that he is an agent would for that purpose be inadmissible as merely begging the question." 4 Wigmore, Sec. 1078.

It is well settled law that the facts of agency or the extent of an agent's powers may not be established by the representations of the agent as a principal is responsible only for that appearance of authority which is caused by himself and not for that appearance of conformity to the authority which is caused only by the agent.

See:

Dudley vs. *Perkins* (1928), 248 N. Y. 250;

Mullen vs. *Quinlan & Co.* (1909), 195 N. Y. 109;

Bussing vs. *Lowell Film Publications, Inc.,* 3rd Dept. (1931), 233 App. Div. 493; aff'd 259 N. Y. 593;

Herschcovitz vs. *Kleinman,* 1st Dept. (1929), 227 App. Div. 62.

It is evident from Point I of our brief that, as a matter of law, plaintiff offered no competent evidence reasonably tending to prove that Mermey, Hemingway and Flanigan had any authority to bind the Fair. This being so, there was no question of agency to go to the jury. (See authorities cited at pp. 11-12 of our brief.)

The cases cited in petitioner's brief in support of its contention that the question should have been left to the jury all hold that it is for the court to determine first whether there is any competent evidence reasonably tending to prove the existence of an agency and, if there is

not, the question must be disposed of by the Court. The citation from Dean Wigmore at page 28 of its brief clearly indicates that before the utterance of an alleged agent may be received "* * * it must have been made in and about the business on which the agent was employed and while actually engaged in that business, * * *."

Answering Sub-Heading B of Point I of Petitioner's Brief:

Established practice does not justify, as contended by petitioner, the admission of proof of the alleged oral agreement first and a consideration of the question of authority at a later stage of the trial. "The order in which evidence may be introduced in a case is within the sound discretion of the trial judge." *Vaughan* vs. *Texas Branches,* C. C. A., 5th Cir. (1940), 112 Fed. (2d), 536 at page 537. And this view is sustained by the authorities cited by petitioner at pages 28 and 29 of its brief.

Moreover, while it may be true, as stated in *First Unitarian Soc. of Chi.* vs. *Faulkner, et al.* (1875), 91 U. S. 415, cited at pages 33 and 34 of petitioner's brief, that in special cases "* * * it is competent for the presiding judge *if in his judgment* the ends of justice require it to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, *if he is well assured by the party offering the evidence that the agency in question will be subsequently proved,*" petitioner entirely overlooks the point that it had no further evidence to offer concerning the alleged authority of these three men. Plaintiff's counsel on the last day of the trial stated to the Court:

> "Mr. Pfeiffer: Now there isn't any point, in my judgment, in my view of the state of the record at the present time, to put up any further evidence in connection with the authority of the officials of the Fair in view of the concessions that were made yesterday. We have those concessions in the record. I have read those concessions, your Honor, *and I do not think that we can add anything to the concessions already made in this record.*" (fol. 447)

The plaintiff had examined at length prior to the trial, as permitted by the Federal Rules of Civil Practice, not only Hemingway, Mermey and Flanigan, but also Grover Whalen, the President of the Fair, and Harvey Gibson, Chairman of the Board of the Fair (fols. 199, 218). But at the trial it was unable to offer any evidence on the question of their authority other than that which appears in the record, although, as appears from the record, it was given ample opportunity by the trial judge to do so.

It therefore would have been a waste of the Court's and litigants' time for the trial judge to permit plaintiff to proceed with what would have been a protracted trial (fol. 175) when it was obvious that no competent evidence could be offered to prove the authority of these men to bind the Fair.

Answering Sub-Heading C of Point I of Petitioner's Brief:

There is nothing inconsistent between the trial judge's rulings and Judge Bondy's decision (fols. 685-692) on the motion for summary judgment. Judge Bondy decided that an oral contract could still be made notwithstanding the provision in plaintiff's bid that acceptance by the Fair must be in writing, signed by a duly authorized agent of the Fair, and that the parties were to be bound only after the concession document had been formally executed by the Fair Corporation. He did not have before him and did not decide the question of whether Hemingway, Mermey and Flanigan had any authority to enter into a binding contract on the Fair's behalf.

The trial judge who accepted Judge Bondy's decision as the law of the case (fol. 428; Opinion fol. 458) refused to permit plaintiff's witness to testify to conversations had with Mermey, Hemingway and Flanigan for the reason that no evidence had been introduced showing that these three men were authorized to bind the Fair (fol. 444; Opinion at fol. 460). Obviously there was no inconsistency between that ruling and Judge Bondy's decision.

The statement (Opinion at fols. 460-461) by the trial judge that plaintiff itself contemplated that a written

agreement was to be entered into does not show any confusion of mind on his part. By that statement, the judge meant that it was apparent from the opening of plaintiff's counsel that the plaintiff's representatives, knowing of the provision in its proposal to bid regarding the method of accepting bids, did not believe themselves that Hemingway, Mermey and Flanigan had any authority to waive such provision or that a contract could be accepted on behalf of the Fair in any such informal manner.

It is unnecessary to comment here on the additional matter contained in sub-heading C of petitioner's brief as the arguments advanced in Point I of our brief answer the same.

Answering Sub-Heading D of Point I of Petitioner's Brief:

The burden of showing the authority of Hemingway, Mermey and Flanigan to orally accept plaintiff's bid was on the plaintiff and it was not for the Fair to show their lack of authority.

See *Schutz* vs. *Jordan* (1891), 141 U. S. 213, page 217, *et seq.*, where the Court said:

> "The ruling of the trial court was correct; the burden was on the plaintiffs, and to the extent indicated in the instructions. This is not a case in which some independent matter is set up as a defense—payment, breach of warranty, counterclaim, and the like, a defense which practically admits the plaintiffs' cause of action, and seeks to defeat it by the existence of other facts. It was not like the plea of confession and avoidance. It was a denial, it denied the sale; and the burden of proving the sale was on the plaintiffs, and rested with them until the close of the case. It would not establish a purchase by the defendants, that an agent of theirs had made a contract. The plaintiffs must go further, and prove that such agent had authority to make the contract. Not to make contracts generally; but to make the contract which in fact was made. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's

authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent. There was no error in this respect."

See also:

Ferro Concrete Construction Co. vs. *The United States*, C. C. A., 1st Cir. (1940), 112 Fed. (2d) 488; certiorari denied, 61 Sup. Ct. 136;

Owens Bottling Machine Co. vs. *Kanawha Banking & Trust Co.*, C. C. A., 4th Cir. (1919), 259 Fed. 838.

The authorities cited by petitioner at page 41 of its brief are not in conflict with the above. They hold merely that if the scope of the agent's authority be proven and it also appears that acts similar to the one sought to be proved under ordinary circumstances would be within the authority of the alleged agent, then a presumption arises that the act in question was authorized and the burden of going forward to show lack of authority is on the person asserting it.

As stated in *Martin* vs. *N. F. P. M'f'g Co.* (1890), 122 N. Y. 165, at page 174:

> *"The general rule, of course, is that the agent's authority in all cases must be shown to charge the prin-*

cipal with an act performed by the agent, but in many instances this fact may be established by presumptive evidence. And this is so where the corporation, whose obligation is in question, is engaged in a business, the nature of which and the duties in relation to which devolved upon its officers, require or justify the giving of negotiable instruments without being authorized thereto by a special vote to that effect. *If the scope of the agent's authority be proven and it appears that acts like the one in question would, under ordinary circumstances,* be within the authority, a presumption arises that the necessary circumstances did exist and that the act in question was authorized. (Morawetz on Corp., § 616; *Lincoln* v. *Iron Co.*, 103 U. S. 412; 116 N. Y. 193; *F. & M. Bk.* v. *B. & D. Bk.*, 16 id. 125; *N. R. Bk.* v. *Aymar,* 3 Hill, 262.)"

But in the instant case there is no evidence, as pointed out in Point I of our brief, that it was within the scope of Hemingway's, Mermey's or Flanigan's authority orally or otherwise to accept bids or execute contracts on behalf of the Fair, or that they had ever done so; nor is there any evidence that they were held out by the Fair as having such authority; nor does it appear from the evidence that under ordinary circumstances they would in the natural course of business of the Fair have had such authority. Accordingly, no presumption arises that their alleged acts were authorized. Hence, the Fair was not called upon to show affirmatively that they had no authority.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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